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In the Supreme Court of the United States

OCTOBER TERM, 1997

BILLY FRANK VICKERS,
Petitioner

V.

THE STATE OF TEXAS
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1). Can appellant raise the issue of the involuntariness of a confession in violation of his Fifth and Fourteenth Amendment Rights in regard to the testimony of an accomplice whose involvement in the crime was learned from appellant's confession when—

a). the confession is not offered into evidence at the trial of the case; and

b). the court denied appellant's motion to suppress the statement before trial.

2). Does law enforcement's placement of a bullet surgically removed from appellant and provided by medical personnel into a locked storage room at a hospital awaiting the arrival of a search warrant constitute a seizure in violation of the appellant's Fourth Amendment Rights?

3). Did the Court's refusal to charge the jury that appellant would have to serve a minimum of 35 years on a life sentence violate appellant's Eight Amendment Rights as incorporated by the Fourteenth Amendment?

4). Does the Texas statutory "Penry" special issue violate the Eighth and Fourteenth Amendments to the United Statates Constitution on the basis that it permits the type of open-ended discretion condemned by the United States Supreme Court in *Furman v. Georgia*?

5). Does the capital sentencing statute's definition of mitigating evidence limit the Eighth Amendment concept of "mitigation" to factors that render a capital defendant less morally "blameworthy" for commission of a capital murder?

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PETITION FOR WRIT OF CERTIORARI TO
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PETITION FOR WRIT OF CERTIORARI

The Petitioner, Billy Frank Vickers, prays that a writ of certiorari issue to review the opinion and judgment of the Texas Court of Criminal Appeals, rendered in these proceedings on December 18, 1996.

Opinions Below

The opinion of the Texas Court of Criminal Appeals, not published, appears at Appendix "A".

Jurisdiction

The judgment of the Texas Court of Criminal Appeals was rendered on December 18, 1996. Petitioner duly filed a

motion for rehearing in said court on February 4, 1997. The motion was denied on March 19, 1997. This petition is being filed within ninety days of the denial of Petitioner's motion for rehearing. Jurisdiction to review said judgment herein by writ of certiorari is conferred on this Court by 28 U.S.C. 1257(3).

Constitutional Provisions, Statutes, and Rules Involved

1). Fifth Amendment to the United States Constitution

2). Fourteenth Amendment to the United States Constitution

3). Fourth Amendment to the United States Constitution

4). Eight Amendment to the United States Constitution

Material Facts and Proper Raising of Question Number One in Lower Court

Petitioner signed a confession on March 26, 1993, implicating Tommy Perkins and Jason Martin. (SF Vol. 2(b), Supression Hearing, State's Exhibit 10). Vickers' pretrial motion to suppress the statement was overruled. Although the confession was not offered during the trial, Jason Martin testified against Petitioner pursuant to a plea bargain agreement. Petitioner objected that the testimony was the "fruit of Petitioner's illegally obtained confession", which was overruled. (SF Vol. 20, p. 405).

Facts Surrounding Confession

In the presence of a deputy, Petitioner first expressed

a desire to see his attorney during his arraignment in his hospital room following surgery. (SF Vol. 2(b), p. 9-12, 30). The magistrate made no effort to appoint an attorney or determine whether Petitioner had an attorney. (SF Vol. 2(b), p. 25). Next, while being transported to jail, Petitioner told the sheriff he wanted to see his attorney when the sheriff attempted to question him. (SF Vol. 2(b), p. 32). Thereafter, though the sheriff's deputies attempted to initiate contact with him (SF Vol. 2(c), pp. 273-274, Petitioner again advised that he wanted a lawyer. (SF Vol. 2(b), p. 51; Vol. 2(c), p. 127). The sheriff repeatedly assured Petitioner that he was "not making a statement" nor "waiving his rights" if he answered questions. (SF Vol. 2(c), p. 134, 143). At that time, Petitioner denied involvement in the crime. Thereafter, Petitioner expressed no desire to speak to the sheriff. Consequently, the sheriff advised Petitioner that he had the ballistics results and inquired as to whether Petitioner wanted to know the same. (SF Vol. 2(b) pp. 61-62. During the interview, after speaking with the Lamar County Attorney's office, the sheriff advised Petitioner that any sentence would be "aggravated" and that Petitioner was looking at 30 to 40 years. (SF Vol. 2(c), pp. 214, 248). He did not tell Petitioner he was looking at a possible death sentence because it would have had a "chilling effect" on the interview. (SF Vol. 2(c), p. 176). The sheriff assured Petitioner that cooperation would "probably get him something". (SF Vol. 2(c), p. 194). Thereafter, Petitioner confessed and described his co-defendant Jason Martin's involvement in the crime. No attorney was appointed for the Petitioner until approximately three months later. (TR 24).

Reasons for Granting the Writ

The Court of Criminal Appeals' decision that the

admittance of evidence gained form a confession which was clearly illegal appears to violate *Michigan v. Jackson,* 475 U.S. 625, 89 L.Ed.2d 631, 106 S.Ct. 1404 (1986) since Petitioner had initially invoked his right to counsel at arraignment which went ignored.

In *Michigan v. Jackson,* supra, this Court held that, if the police initiate an interrogation after a defendant's assertion of his right to counsel at an arraignment, any waiver of that right for a police-initiated interrogation is invalid. Furthermore, interrogation extends to words or actions by peace officers that they should have known were likely to elicit a response from an accused. *Rhode Island v. Innis,* 446 U.S. 291, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980). After repeated invocations of the right to counsel, by his own admittance, the sheriff used the ballistics results to entice the Petitioner to meet with him and further misrepresented the type of sentence Appellant was facing so as not to "chill" any discussion. This confession led to the discovery of Jason Martin's involvement in the crime. Significantly, the State did not offer Petitioner's confession into evidence at the trial of this case. Rather, the State obtained and used Jason Martin's testimony pursuant to a plea bargain arrangement.

Material Facts and Proper Raising of Question Number Two in Lower Court

A bullet-wounded petitioner was located by the sheriff's department in proximity to the murder site. (SF Vol. 19, pp. 71-72, 241). Surgery was performed to remove a bullet from Petitioner. (SF Vol. 21, p. 580). Medical personnel gave the bullet to a sheriff's officer who was guarding Petitioner following his request therefore. (SF Vol. 21, p. 557). The

officer placed the bullet in a locked room by the security guard's office until he could obtain a search warrant. (SF Vol. 21, pp. 561-562, 611). Petitioner objected to the introduction of the bullet when the State offered the same into evidence at the trial.

Reasons for Granting the Writ

The Texas Court of Criminal Appeals ignored the issue that a police officer "seized" a bullet from Petitioner without a search warrant, contrary to the principles of *United States v. Jacobsen,* 466 U.S. 109, 104 S.Ct. 1652, 80 L.Ed.2d 85 (1984).

The few circumstances justifying a warrantless search are carefully prescribed. *Coolidge v. New Hampshire,* 408 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971). A seizure occurs when there is some meaningful interference with an individual's possessory interests in the item seized. *United States v. Jacobsen,* supra. Here, the officer admitted that he took and placed the bullet in a locked room because he did not want the Petitioner's family retrieving the same until he could obtain a warrant. (SF Vol. 21, p. 611). A warrantless seizure occurred.

Material Facts to Proper Raising of Question Number Three in Lower Court

Prior to and during voir dire, Petitioner requested that the prospective jurors be instructed that Texas law required a minimum thirty-five years of service on a life sentence. (SF Vol. 4, pp. 4-11). The request was denied. (SF Vol. 4, p. 11, 724, 770). Throughout voir dire, prospective jurors repeatedly

raised the issue of parole on a life sentence. (SF Vol. 9, pp. 1409-1410; Vol. 10, p. 1754; Vol. 11, pp. 2622-2626). At the punishment phase, Petitioner again requested that the jury be instructed concerning the minimum thirty-five year service, which request was denied. (SF Vol. 24, p. 1094).

Reasons for Granting Writ

The refusal to instruct the jury that a capital defendant receiving a life sentence would serve a minimum thirty-five years is in direct conflict with this Court's reasoning in *Simmons v. South Carolina*, 512 U.S. ____, 129 L.Ed.2d 133, 114 S.Ct. 2187 (1994), as well as *Gregg v. Georgia*, 453 U.S. 153, 190 (1976).

Petitioner's position is based on this Court's reasoning set forth in *Simmons v. South Carolina*, supra, (plurality op.) (due process grounds); C.J., and Kennedy, J., concurring) (due process grounds); id. at 2198-99 (Sauter, J., joined by Stevens, Jr., concurring) (Eighth Amendment and due process grounds). While the majority opinion in *Simmons* addressed only the due process claim, Justice Sauter in his concurring opinion further reasoned that the Eighth Amendment requires a capital sentencing jury to be informed of the meaning of "life" imprisonment under State law because the Eighth Amendment's "need for heightened reliability...mandates recognition of a capital defendant's right to require instructions on the meaning of legal terms used to describe the sentences...when a jury is required to consider, in making a reasoned moral choice between sentencing alternatives". (114 S.Ct. at 129 L.Ed.2d 147-149) (opinion of Sauter, J., concurring, joined by Stevens, J.).

Such reasoning has previously been expressed by this Court in *Gregg v. Georgia*, 453 U.S. 153, 190 (1976):

> [if] an experienced trial judge, who daily faces the difficult task of imposing sentences, has a vital need for accurate information about a defendant and the crime he committed in order to be able to impose a rational sentence in the typical criminal case, then accurate sentencing information is an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die by a jury of people who may never have made a sentencing decision.

Consequently, the withholding of a capital defendant's lengthy parole ineligibility from the jury distorts the jury's view of both the incapacitative and retributive effect of the noncapital sentencing alternative. Thereby, a needless and substantial risk arises that the jury will impose the death sentence to eliminate a nonexistent danger of release on parole.

"When a jury is the final sentencer, it is essential that the jurors be properly instructed regarding all facets of the sentencing process". The critical facet of the sentencing process about which the jury was neither instructed about during voir dire or sentencing was the meaning and effect of the jury's non-death alternative of life imprisonment. Because this information provided a reason why the jury might have found the death penalty inappropriate for Petitioner and also because, without it, the jury could not accurately assess the right to be accorded Vickers' mitigating evidence, the withholding of an accurate instruction on parole eligibility violated the well-established Eighth Amendment require-

ment that a capital sentencing jury consider "any relevant circumstances that could cause it to decline to impose the [death] penalty...and any relevant information offered by the defendant". *McCleskey v. Kemp,* 481 U.S. 279, 306 (1987).

Due Process Violation

Because "future dangerousness" remains a pivotal issue in the post-*Penry* Texas capital sentencing phase, to afford due process in voir dire, a Texas jury panel should be informed that a capital defendant will serve at least thirty-five years on a life sentence. See *Simmons v. South Carolina,* supra. This Court, in *Skipper v. South Carolina,* 476 U.S. 1 (1986), further held that "where the prosecution specifically relies on a prediction of future dangerousness in asking for the death penalty", the defendant must be allowed to demonstrate that he will not pose such a threat if spared the death penalty.

In this case, jurors' voir dire responses demonstrated a pervasive belief that a person receiving a life sentence would be paroled within a few years.

The parole instruction submitted in this case instructed the jurors that "they were not to consider or discuss any possible action of the Board of Pardons and parole or the Governor". (TR Vol. 114, p. 234). In *Simmons,* this Court recognized that jurors would be unable to follow such an instruction, and the same would only invite unconstitutional speculation about parole. A belief that speculation about parole can be removed by such an instruction "is like the Mark Twain story of the little boy who was told to stand in the corner and not to think about white elephants." See *United States v.*

Antonnelli Fireworks, 155 F.2d 613, 656 (2nd Cir. 1946) (Frank, J., dissenting).

Material Facts and Proper Raising of Question Number Four in Lower Court

At the punishment phase of this trial, the Court charged the jury with the new "Penry" special issue set out in Texas Code of Criminal Procedure, Article 37.071, which Petitioner contended violated his Eighth and Fourteenth Amendment Rights.

Reasons for Granting the Writ

Article 37.071 of the Texas Code of Criminal Procedure fails to meet the requirements for capital sentencing jurors as voiced in *Furman v. Georgia,* 408 U.S. 238 (1972).

This Court, in *Furman v. Georgia,* supra, condemned the open-ended, unstructured discretion that was given to capital sentencing juries.

Article 37.071 of the Texas Code of Criminal Procedure provides as follows:

> Whether, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, there is sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than a death sentence be imposed.

Five members of the modern Supreme Court have

condemned instructions such as Article 37.071 as violative of the Eighth and Fourteenth Amendments. See *Penry v. Lynaugh,* 109 S.Ct. 2934, 2969 (1989) (Scalia, J., dissenting, joined by Rehnquist, C.J., White, J., and Kennedy, Jr.). ("In holding that the jury had to be free to deem Penry's mental retardation and sad childhood for whatever purpose it wished, the Court has come full circle, not only permitting but requiring what *Furman* once condemned".); *Graham v. Collins,* 113 S.Ct. 892, 903-15 (1993) (Thomas, J., concurring). ("*Penry*" reintroduces the very risks that we sought to eliminate through the simple directive that States in all events provide rational standards for capital sentencing".). In dicta, Justice Thomas has explicitly suggested that the type of sentencing scheme in operation at Petitioner's trial violates *Furman.* See *Graham,* 113 S.Ct. at 913 n. 9 (discussing the unconstitutionality of the present Texas capital sentencing statute). See also *Staley v. State,* 1994 WL 146696. (Baird, J., concurring, joined by Maloney nand Overstreet, JJ.). ("Although I do not agree with Justice Thomas that *Penry* should be overruled, I can sympathize with Justice Thomas.").

Rather than the open-ended, unstructured sentencing experienced under Article 37.071, the Eighth Amendment requires a trial court in the sentencing phase of a capital case to submit a charge adequately structuring the jury's sentencing discretion regarding mitigating and aggravating factors.

Material Facts and Proper Raising of Question Number Five in Lower Court

Pursuant to Article 37.071, the jury was instructed that "mitigating evidence is evidence that a juror might regard

as reducing the defendant's blameworthiness". (TR Vol. 114, p. 237).

Reasons for Granting the Writ

Article 37.071 of the Texas Code of Criminal Procedure unconstitutionally limits the consideration of mitigating evidence contrary to the priciples enunciated in *Penry v. Lynaugh,* supra.

The above-described definition of mitigating evidence is unconstitutionally narrow. Mitigating evidence is not simply evidence that relates to a capital defendant's moral culpability or blameworthiness for the crime but also includes any mitigating evidence relevant to a defendant's character, history, or circumstances of the crime that militates in favor of a life sentence. See *Skipper v. South Carolina,* supra. Although the statutory *"Penry"* special issue speaks of the circumstances of the offense, the defendant's character and background and the personal moral culpability of the defendant, Article 37.071, Section 2(e)'s separate definition of "mitigating evidence" limits jurors' consideration of such evidence to those mitigating factors that specifically implicate a defendant's moral blameworthiness.

Conclusion

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Texas Court of Criminal Appeals.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three true copies of the foregoing Petition for Writ of Certiorari have been served on the District Attorney of Lamar County, Texas, the State Prosecuting Attorney, and the Clerk of the Court of Criminal Appeals, by delivery of a true copy to them by mail, by depositing same, postpaid, in an official depository under the care and custody of the United States Postal Service on the 19th day of June, 1997, enclosed in a wrapper properly addressed as follows: Mr. Kerye Ashmore, Lamqar County District Attorney, lamar County Courthouse, 119 North Main, Paris, Texas 75460; State Prosecuting Attorney, P.O. Box 12405, Capital Station, Austin, Texas 78711; and Mr. Thomas F. Lowe, Clerk of the Court of Criminal Appeals, P.O. Box 12308, Capital Station, Austin, Texas 78711.

/s/ James R. Rodgers

James R. Rodgers

APPENDIX A

BILLY FRANK VICKERS, Appellant

No. 71,801 v. - - - - Appeal from LAMAR County

THE STATE OF TEXAS

O P I N I O N

In October 1993 a jury convicted appellant of capital murder under Texas Penal Code § 19.03 (a) (2). The offense, murder in the course of robbery, was committed on March 12, 1993. This cause originated in Lamar County and was transferred to Collin County on change of venue. At the punishment phase of the trial, the jury answered the special issues submitted to them under Texas Code of Criminal procedure Article 37.071 § 2,[1] and the trial court accordingly sentenced appellant to death. Direct appeal to this Court is automatic. Article 37.071 § 2(h). Appellant raises fifty-six points of error. We will affirm.

I. Evidentiary Sufficiency at Guilt-Innocence

In point of error twenty, appellant challenges the sufficiency of the evidence to prove decedent died of gunshot wounds sustained during the robbery attempt. A brief review of the evidence, viewed in the light most favorable to the verdict, is necessary:

The fifty-year-old decedent and his wife owned a convenience store in Lamar County, Texas, where they regularly

[1] Unless otherwise indicated, all references to articles are to those in the Texas code of Criminal Procedure.

cashed large numbers of personal and payroll checks for the general public. During the afternoon of Friday, March 12, 1993, the decedent left the store temporarily to deposit cashed checks and to get more money for cashing checks that weekend. At around 7:00, the decedent called his wife from the store and asked her if she needed anything before he headed home. Sometime after the telephone call, the decedent's wife heard gun shots from the front of their house. She immediately telephoned her son and then watched as the decedent drove his truck towards the house, veered off the road, and crashed into a tree. The decedent, who was still alive, appeared to have been shot in the chest. he was having difficulty breathing and blood was spilling from his mouth. An ambulance soon arrived and took him to a hospital. The decedent's gun and a bag containing over eighteen thousand dollars were recovered from his truck.

A medical examiner from Dallas County testified without objection that he performed a post-mortem examination on the body of the decedent. The State introduced pictures of the body into evidence. The examiner stated that the decedent's body had three gunshot woulds, two of which were to his right arm and one of which was to his chest. The examiner determined that he had died as a result of the gunshot wound to his chest.

Appellant argues that, although the State established the decedent had been shot, it "did not establish that he died as a result therefrom." In addition, appellant complains that although at trial the medical examiner identified the body as the named decedent and testified that he had died as a result of a bullet wound to his chest, there was no proof at trial that the body autopsied by the doctor was in fact the

named decedent. Appellant contests neither that the decedent was shot, nor that the body autopsied by the examiner died as a result of a bullet wound to the chest.

A legal sufficiency review requires that, while viewing the evidence in a light most favorable to the verdict, we ask whether any rational trier of fact could have found beyond a reasonable doubt all of the elements of the offense. *Jackson v. Virginia*, , 443 U.S. 307, 319, 99 S.Ct. 2781, ____, 61 L.Ed.2d 560, 573 (1979); *Chambers v. State*, 866 S.W.2d 9, 15 (Tex.Crim.App. 1993). Upon reviewing the testimony of the medical examiner and family members, as well as photographs of the named decedent taken prior to the murder and at the beginning of the autopsy, we determine that any reasonable trier of fact could find beyond a reasonable doubt that the decedent died after he was shot and that the body autopsied by the medical examiner was that of the named decedent. Appellant's twentieth point of error is overruled.

II. Parole Law

In combined points five through eight, appellant complains of the trial court's refusal to inform prospective and selected jurors of the application of parole laws in Texas in a capital murder prosecution. In his seventh and eighth points of error, appellant contends that the trial court erred in granting the State's motion in limine requesting defense counsel not to bring before the jury any matter concerning parole law or how much time appellanat would have to serve under any sentence less than death, thereby violating the Eighth and Fourteenth Amendments to the United States Constitution. Appellant objected to the State's motion and requested that the court instruct each veniremember that a prisoner serv-

ing a life sentence for a capital felony is not eligible for release on parole until the actual calendar time the prisoner has served, without consideration of good conduct time, equals thirty-five calendar years. *See* Article 42.18 § 8(b) (2) (presently forty years). The trial court denied appellant's request. However, during voir dire, the court did instruct those veniremen who raised the subject of parole that a qualified juror could not consider any possible actions of the Board of Pardons and Parole, and that in a Texas capital murder case, a life sentence means life.

In points of error five and six, appellant complains that the trial court's refusal to incorporate his requested parole law instructions into the jury charge violated his rights under the Eighth and Fourteenth Amendments to the United States Constitution. Appellant requested the following instructions to be included in the jury charge at punishment:

> Regarding the law of parole, you are instructed that a prisoner under sentence of death is not eligible for parole. A prisoner serving a life sentence for a capital felony is not eligible for release on parole until the actual calendar time the prisoner has served, without consideration of good conduct time, equals 35 calendar years.

The trial court refused appellant's requested instruction and instead included the following language in the jury charge:

> You are further instructed that in answering the special issues given in this charge and in determining punishment in this case, that you must not discuss among yourselves, speculate, or consider how long the defendant will be required to serve any sentence of confine-

ment or to speculate upon or consider any possible actions of the Parole Division of the Texas Department of Criminal Justice. You are instructed that a life sentence in a capital murder case means life.

We have held that a trial court's refusal to inform the jury about the possibility of parole in a capital murder prosecution neither violates the United States Constitution's guarantee against cruel, and unusual punishment nor denied a defendant due process under the same. *Smith v. State,* 898 S.W.2d 838, 847-853 (Tex.Crim.App.) (plurality opinion), *cert. denied,* ____ U.S. ____, 116 S.Ct. 131, 133 L.Ed.2d 80 (1995); *Broxton v. State,* 909 S.W.2d 912, 918-919 (Tex.Crim.App. 1995); *Willingham v. State,* 897 S.W.2d 351, 358-359, (Tex.Crim.App.), *cert. denied,* ____ U.S. ____, 116 S.Ct. 385, 133 L.Ed.2d 307 (1995). Absent a federal constitutional requirement to the contrary, it will remain the policy of Texas not to inform juries of the legislative consequences of a life sentence. *Smith,* 898 S.W. 2d at 849. *See also Curry v. State,* 910 S.W.2d 490, 498 (Tex.Crim.App. 1995); *Green v. State,* 912 S.W.2d 189 (Tex.Crim.App. 1995), *cert. denied,* ____ U.S. ____, 116 S.Ct. 2556, ____ L.Ed.2d ____ (1996); *Sonnier v. State,* 913 S.W.2d 511, 521 (Tex.Crim.App. 1995). Because appellant raises no new arguments that persuade us to revisit these holdings, we overrule points of error five through eight.[2]

In his fifty-sixth point of error, appellant argues that

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[2] Appellant responds that his situation is distinguishable from our holding in *Smith* because, under the applicable parole law in that case, a defendant was eligible for parole after fifteen years, as opposed to thirty-five years. Appellant bases his argument on the assumption that "thirty-five years is, affectively life without parole." Appellant provides no further support for his contention and has not sufficiently briefed this issue for our review. Tex.R.App.Proc. 74(f).

the court's instruction to disregard the possibility of parole violated Article IV § 11 of the Texas Constitution because it actually encouraged the jurors to consider parole when they assessed his future dangerousness. Appellant fails to clarify whether his claim applies to the instruction given to prospective jurors during voir dire, the instruction given in the punishment charge, or both. Regardless, appellant did not make this objection at any pont during the trial and has not preserved his claim for review. *See* Tex.R.App.Proc. 52(a); *Butler v. State,* 872 S.W.2d 227; 239-240 (Tex.Crim.App. 1994), *cert. denied,* ____ U.S. ____, 115 S.Ct. 1115, 130 L.Ed.2d 1079 (1995). Therefore, his complaint regarding the included anti-parole instruction must fail unless he can show egregious error. *Almanza v. State,* 686 S.W.2d 157, 171 (Tex.Crim.App. 1984); Penry v. State, 903 S.W.2d 715, 749 (Tex.Crim.App.), *cert. denied,* ____ U.S. ____, 116 S.Ct. 480, 133 L.Ed.2d 408 (1995).

Appellant claims that he was harmed significantly, but he provides no support for his conclusion. He fails to explain how the jury instruction actually encouraged jurors to consider parole. *See Almanza,* 686 S.W.2d at 171. Absent evidence to the contrary, a court's instructions are presumed to be efficacious. *See Moore v. State,* 882 S.W.2d 844, 847 (Tex.Crim.App. 1994), *cert. denied,* ____ U.S. ____, 115 S.Ct. 909, 130 L.Ed.2d 791 (1995) (presuming court's voir dire instructions to be efficacious when nothing in the record indicated prosecutor's question had prejudiced jury). We are not convinced that there was error; and even if error were presumed, it was not egregious. We overrule appellant's fifty-sixth point of error.

III. Pretrial

Appellant contends in his ninth point of error that the trial court reversibly erred when it overruled his consecutive motion for a mistrial, continuance, and further voir dire. Appellant asserts that the arrest of a suspect, Michael Blair, in an unrelated murder of a yound girl in Collin County, Texas was covered extensively by the media.[3] The suspect, Blair, had been paroled after having served only eighteen months of a ten-year sentence for burglary and indecency with a child. According to appellant, "the public outcry was intense concerning the lack of time served on criminal sentences" and that during his voir dire "it was clear that the publicity regarding sentencing had had an impact on the veniremen." He insists that the facts and reporting of the Blair case prejudiced the jury against him.

Appellant has inadequately briefed this point of error, as he offers absolutely nothing in the way of citations to the record or argument to support his factual allegations that "publicity regarding sentencing" affected members of his jury panel and prejudiced the jury against him.[4] *See*

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[3] Blair was subsequently tried for and convicted of capital murder and assessed a death sentence, which this Court has afirmed in *Blair v. State*, No. 72,009 (Tex.Cr.App. delivered September 25, 1996).

[4] The only Texas case cited by appellanat in favor of his claims is not on point because it concerns pretrial publicity and public sentiment against a defendant arising from that defendant's own case. *Mickle v. State*, 85 Tex.Crim. 560, 213 S.W. 665 (1919). In that case, public sentiment against the defendant was evidenced by the presence of law enforcement officers at his trial, who apparently were in the courtroom to guard the defendant against racially motivated attacks. In contrast, the alleged bias against appellant in the case at bar stems from an unrelated murder case and is wholly unsupported with references to the record.

Tex.R.App.Proc. 74(f); *Garcia v. State,* 887 S.W.2d 862, 882 (Tex.Crim.App. 1994), *cert. denied,* ____ U.S. ____, 115 S.Ct. 1368, 131 L.Ed.2d 223 (1995). At most, appellant has shown that, during appellant's voir dire, there was some media attention concerning an unrelated murder case. Appellant's ninth point of error is overruled.

IV. Voir Dire

A. Appellant's Challenges for Cause

In points of error twenty-four through thirty-four, appellant complains that the trial court committed reversible error in overruling eleven of his challenges for cause during voir dire. The State disagrees that appellant has preserved error. We will address the State's contentions first.

When the trial court erroneously overrules a challenge for cause, the defendant is harmed only if he uses a peremptory strike to remove the venireperson and thereafter suffers a detriment from the loss of the strike. *Demouchette v. State,* 731 S.W.2d 75, 83 (Tex.Crim.App. 1986), *cert. denied,* 482 U.S. 920, 107 S.Ct. 3197, 96 L.Ed.2d 685 (1987). Error is preserved only if the defendant (1) exhausts his peremptory challenges, (2) is denied a request for an additional peremptory challenge, and (3) identifies a member of the jury whom he would have struck with the lost peremptory challenge. *Id.*

By mutual agreement, questioning of the jury panel in the case at bar was completed prior to any exercise of peremptory challenges. *See Roussesau v. State,* 824 S.W.2d 579, 582 (Tex.Crim.App. 1992), *cert. denied,* ____ U.S. ____, 114 S.Ct.

313, 126 L.Ed.2d 260 (1993).[5] The record reveals that during jury selection, appellant exhausted his fifteen peremptory strikes, requested additional strikes, and received three additional ones.[6] After exercising his extra strikes, appellant requested and was denied a fourth additional peremptory strike immediately before venireman Moore was selected as the twelfth juror. Appellant identified Moore as an objectionable juror and stated that he would have struck Moore with a peremptory challenge.

Citing *Burns v. State,* 556 S.W.2d 270, 279 (Tex.Crim.App.), *cert. denied,* 434 U.S. 935, 98 S.Ct. 422, 54 L.Ed.2d 294 (1977), the State argues that appellant has failed to preserve error because he never challenged Moore for cause during voir dire. However, *Burns* is distinguishable from the instant case because the issue in *Burns* was whether or not the trial court erroneously refused to grant appellant additional peremptory challenges. By contrast, the purported error in this case allegedly occurrred when the trial court previously denied appellant's challenges for cause. We have

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[5] In *Rousseau,* we recognized that "[a]n alternative procedure sometimes utilized in building the jury list is to question a number of veniremembers individually except challenges for cause" whereupon "[a]fter forty-two persons have been qualified and questioned (12 to be seated as jurors and 15 strikes for each side), the parties then make their strikes and objections much the same as in a non-capital case." *Id.* at n. 4. In this case, the trial court qualified forty-six jurors before beginning selection of the twelve jurors and two alternates. *Rousseau* also noted that the numbers should be adjusted to include whatever number of alterntes that will also be seated. *Id.*

[6] Appellant asserts that he received two additional peremptory challenges, and the State counters that he received four. However, the record shows that the appellant exercised three additional peremptory challenges before the twelfth juror was selected. Appellant then used a single peremptory challenge during the selection of two alternate jurors, as provided in Article 35.15 (d).

never applied the preservation of error requirement in *Burns* to a defendant claiming that he was erroneously denied a challenge for cause. The facts of this case place appellant squarely within the rule we laid down in *Wolfe v. State,* 147 Tex.Crim. 62, 74, 178 S.W.2d 274, 281 (1944) (on rehearing) and cited in *Cumbo v. State,* 760 S.W.2d 251, 253-254 (Tex.Crim.App. 1988).

> [I]n the trial of a criminal case where an accused has been wrongfully deprived of a peremptory challenge by being forced to use such upon a juror who was shown to be subject to a challenge for cause, and such accused has exhausted his peremptory challenges, and a further juror be presented whom he states to be objectionable to him, then it will not be necessary for (the) accused to show in what manner such further juror was objectionable to him, nor to show that such juror was an unfair or partial juror. In further words, we think the accused should only be required to exercise a peremptory challenge on the objectionable juror and not a challenge for cause, nor show grounds for a challenge for cause, nor to show why such juror was objectionable to him."

Thus, it was unnecessary for appellant either to challange Moore for cause or to show why he was objectionable. *See also Garcia v. State,* 887 S.W.2d 846, 852 (Tex.Crim.App. 1994), *cert. denied,* ____ U.S. ____, 115 S.Ct. 1317, 131 L.Ed.2d 198 (1995).

Appellant alleges that eleven of his challenges for cause were erroneously denied. However, two of his eleven challenges, which appellant discusses in points thirty-one

and thirty-four, fail at the outset because appellant did not preserve error. We will address these two points first.

In his thirty-first point of error, appellant complains that the trial court erroneously overruled his challenge against veniremember Partin. Appellant can show harm from the alleged error only if he used a peremptory strike to remove the venireperson. *Demouchette,* 731 S.W.2d at 83.

Although the trial court initially declared that Partin was a qualified juror over appellant's objection, it subsequently granted the State's challenge for cause against Partin. Thus, appellant did not exercise a peremptory strike against Partin. Appellant's thirty-first point of error is overruled.

Appellant asserts in his thirty-fourth point of error that the trial court wrongly denied his challenge for cause against veniremember Securo. After twelve jurors were selected, the trial court began the selection of two alternate jurors, for which each party had one strike. *See* Article 35.15(d). After appellant and the State accepted one alternate juror, appellant used his single strike against Securo, the next proposed alternate. Following appellant's strike of Securo and the State's subsequent use of its single peremptory challenge, a second alternate juror was selected.

Although selection of alternate jurors is treated as separate and distinct from selection of the twelve jury members, the rules for preserving error on challenges for cause during both are the same. *Cooke v. State,* 844 S.W.2d 697, 721 (Tex.Crim.App. 1992). *cert. denied,* ____U.S.____, 113 S.Ct. 3048, 125 L.Ed.2d 732 (1993). Appellant must first exhaust his peremptory challenges, request and be denied an additional peremptory challenge, and assert that an

objectionable alternate juror, against whom he would have exercised a peremptory strike had he had one, served on the twelve-member jury. *See Id.* at 721-722. Appellant did exhaust his single peremptory challenge by striking venireman Securo; however, he failed to request an additional peremptory strike, to assert that the second alternate juror was objectionable, and to show that the second alternate served on the jury. Because appellant failed to preserve error, we overrule his thirty-fourth point of error.

Error, if any, was preserved for nine venirepersons.[7] *See Den[illegible]uchette,* 731 S.W.2d at 83. However, because the trial court granted appellant three additional peremptory strikes, we cannot reverse appellant's conviction unless he demonstrates that the trial court committed error in discharging *four* jurors. *Penry,* 903 S.W.2d at 732. Because we will ultimately hold that the trial court did not abuse its discretion regarding six of nine venirepersons, and because appellant was given, three extra peremptory strikes, appellant can show no harm. *Id.; see also Chambers,* 866 S.W. 2d at 23. Therefore, we need not address points three points; specifically points twenty-four, twenty-six, and thirty-two.

The denial or grant of a challenge for cause is within the discretion of the trial court and will not be overturned absent an abuse of discretion. *Banda v. State,* 890 S.W.2d 42,

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[7] We point out that each of these points of error is multifarious. By combining more than one contention in single point of error, a defendant risks rejection on the ground that nothing will be presented for review. *Sterling v. State,* 800 S.W.2d 513, 521 (Tex.Crim.App. 1990), *cert. denied,* 501 U.S. 1213, 111 S.Ct. 2816, 115 L.Ed.2d 988 (1991). In nine points of error, appellant raises over twenty-three contentions. However, we will address the merits of appellant's allegations as briefed in the interest of justice and judicial economy.

53 (Tex.Crim.App. 1994), *cert. denied*, ____ U.S. ____, 115 S.Ct. 1967, 132 L.Ed. 2d 260 (1995). A trial court abuses its discretion only when its decision was so clearly wrong as to lie outside that zone within which reasonable persons might disagree. *Kemp v. State*, 846 S.W.2d 289, 297 (Tex.Crim.App. 1992), *cert. denied*, ____ U.S. ____, 113 S.Ct. 2361, 124 L.Ed.2d 268 (1993). We examine the record as a whole to deteremine whether or not there is support for the trial court's decision and in doing so, we give great deference to the trial court. *Id.* at 53-54; *Penry*, 903 S.W.2d at 728; *Satterwhite v. State*, 858 S.W.2d 412, 415 (Tex.Crim.App.), *cert. denied*, ____ U.S. ____, 114 S.Ct. 455, 126 L.Ed.2d 387 (1993). We note that, especially when faced with a vacillating or equivocating venireperson, the trial court is able to consider important factors such as demeanor and tone of voice that do not come across when reviewing a cold record. *Mooney v. State*, 817 S.W.2d 693, 701 (Tex.Crim.App. 1991).

In his twenty-fifth point of error, appellant alleges that venireman Savage was objectionable because "he (1) was predisposed to the death penalty; and (2) was biased in favor of the State."- Within his first contention, appellant specifically argues that "Savage was biased in favor of the imposition of the death penalty as a matter of law" because "he could not distinguish between issues One and Three in that he believed that, if someone was a danger to society, there could be no mitigation."[8] After explaining to Savage the three

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[8] Appellant also argues on appeal that Savage was predisposed to the death penalty because "his questionaire clearly stated that he thought life imprisonment was not the appropriate punishment for capital murder," and because he "did not believe a life sentence could ever be proper as 'life' did not mean 'life'." However, appellant did not raise these two issues at trial. Therefore, he has failed to preserve them for our review. *See* Tex.R.App.Proc. 52(a). *See also Turner v. State*, 805 S.W.2d 423, 431

special punishment issues,[9] the prosecutor asked the following questions:

> Q. Would you keep an open mind even though you voted yes on special issues 1 and 2 and got to 3 and looked to see if there was sufficient mitigating circumstances there to warrant a life sentence instead of a death sentence?
>
> A. I could keep the options open to that stage, yes.
>
> Q. Can you — if you can't it's fine — but can you think of a fact situation where a person might be a continuing threat, may have actually killed or intended

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footnote 8 continued

(Tex.Crim.App.), *cert. denied*, 502 U.S. 870, 112 S.Ct. 202, 116 L.Ed.2d 162 (1991); *Johnson v. State*, 803 S.W.2d 272, 292 (Tex.Crim.App. 1990), *cert. denied*, 501 U.S. 1259, 111 S.Ct. 2914, 115 L.Ed.2d 1078 (1991), *overruled on other grounds, Heitman v. State*, 815 S.W.2d 681 (Tex.Crim.App. 1991).

[9] The three special issues submitted to the jury at punishment were as follows:

> 1. Whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society;
>
> 2. Whether the defendant actually caused the death of the deceased or did not actually cause the death of the deceased, but intended to kill the deceased or another or anticipated that a human life would be taken; and, upon affirmative answers to the first two issues, and
>
> 3. Whether, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than death sentence should be imposed.

to kill, but ought to receive a life sentence because of something mitigation?

A. I find a little bit of a conflict between special issue number 3 and special issue number 1. In your example, I think I would find it more difficult to find that that individual was a continuing threat than to find that there were mitigating circumstances.

The prosecutor explained that by providing the third special issue, the law contemplates situations in which a jury might answer affirmatively all three special issues. The prosecutor continued as follows:

Q. Can you follow the law and can you believe that thee would be times where you could find yes to 1, yes to 2 and yes to 3 where maybe someone ought to get a life sentence?

A. I can see where in the broad form of special issue number 3 that there would be a possibility that you could find that way.

* * *

Q. I take it you can see it may not be a frequent thing but there is a possibility on special issue number 3 that that could be answered yes, even though special issue 1 and 2 are yes.

A. I can see where that could occur.

Savage then assured the prosecutor that he would base his answers to the special issues on the evidence and would

not contrive his answers in order to assure a certain result. Defense counsel then questioned Savage extensively about his ability to consider mitigation evidence:

> Q. Given the point of view that you expressed about a life sentence and your perception of it, given that you indicated that entered into the equation, if you were in a given case and were convinced beyond a reasonable doubt that someone would constitute a continuing threat to society, would not that perception and belief basically render it impossible for you to do anything other than give a death sentence?
>
> A. Within the context of special issue 1, 2 and 3, I have already stated that I can reach an independent decision on the evidence presented on each of those 3 circumstances, and I have also already indicated that finding in favor of — finding in special issue number 1 that the defendant would constitute a continuing threat, that it would be probably very difficult to find or — to find in the evidence the mitigating circumstances to say that a life sentence would be appropriate.

Savage admitted that although it would be difficult for him to answer the mitigation special issue affirmatively after having found that the defendant would pose a continuing threat to society, he consistently stated that he could follow the law and would not automatically answer the third issue negatively. In addition, he said that he could envision answering the question affirmatively. In light of Savage's entire voir dire, we hold that the trial court was well within its discretion in overruling appellant's challenge for cause on this ground. *See Mooney,* 817 S.W.2d at 702 (no abuse of

discretion in denying challenge for cause of veniremember who stated that although he could not think of a case in which he would answer provocation issue negatively, he thought that there could be such a case "out there").

Appellant alleges in his second contention that "the totality of Savage's voir dire examination reveals a clear predisposition to find in favor of the State." In support of this, appellant asserts that Savage "was biased against defense attorneys, defendants, and 'technicalities' of the law that prevented evidence from being offered." A defendant may not challenge a prospective juror for cause unless the veniremember has demonstrated either a bias againsst the defendant as a person or a bias against some phase of the law upon which the defendant is entitled to rely. *Cordova v. State,* 733 S.W.2d 175, 180 (Tex.Crim.App. 1987), *cert. denied,* 487 U.S. 1240, 108 S.Ct. 2915, 101 L.Ed.2d 946 (1988); *Earhart v. State,* 823 S.W.2d 607, 627 (Tex.Crim.App. 1991), *cert. granted and remanded,* ____ U.S. ____, 113 S.Ct. 3026, 125 L.Ed.2d 715 (1993), *reaffirmed,* 877 S.W.2d 759 (Tex.Cr.App. 1994), *cert. denied,* ____ U.S. ____, 115 S.Ct. 431, 130 L.Ed.2d 344 (1994). *See also* Article 35.16(c) (2). Upon reviewing the entire voir dire of veniremember Savage, we find no such bias.

During the prosecutor's examination of the prospective juror, Savage stated that he thought that certain lawyers "do everything they can to get someone that they know to be guilty off for either idealistic reasons or reasons of power or prestige or money." However, Savage assured the prosecutor that he had no knowledge of appellant's trial attorneys and did not have that opinion of them. Under questioning by defense counsel concerning his belief about some criminal

defense attorneys, Savage stated, "It's a generalized view. And I assure you, sir, it has nothing to do with you personally, this defendant, your co-counsel or anything else."

Upon further questioning by defense counsel, Savage expressed a general respect for prosecutors, who, according to Savage, have a "difficult and challenging job representing society" because they have to overcome "technicalities" in presenting evidence at trial. Savage added that he felt on occasion,prosecutors are not able to bring all the evidence they have before a jury; however, he stated that he would not be affected by this belief in this case and would render a verdict on the basis of the evidence presented.

Defense counsel summarized his concerns about Savage during the following exchange:

> Q. My question is as this process is started, in your mind — and I want you to be honest — you are not going to hurt our feelings. Are we really starting out on an even playing field?
>
> A. I think the prosecution and defense start on an even playing field with me because I have this sense that right is right and wrong is wrong, and that allows me the freedom to consider evidence, to render an unaffected verdict, to render an unaffected judgment, and to be honest with you here today.

Verireman Savage did not demonstrate a prejudice directed toward appellant, nor was he biased as a matter of law under the various rationales set forth in *Anderson v. State,* 633 S.W.2d 851, 853-854 (Tex.Crim.App. 1982). Savage repeatedly stated that he believed he could remain fair and

impartial, notwithstanding any opinions he held aout some defense attorneys and about prosecutors' difficulties in presenting evidence because of "technicalities." Any expression of a veniremember's opinions does not give rise to a finding of bias as a matter of law when the prospective juror states that he could lay aside any opinions which he may have formed. *Kemp*, 846 S.W.2d at 299. We hold that venireman Savage's voir dire examination supports the trial judge's ruling. Appellant's twenty-fifth point of error is overruled.

Appellant asserts in his twenty-seventh point of error that the trial judge erred in denying his challenge for cause against veniremember Crawford. Appellant complains that Crawford "(1) could not follow the law concerning parties; and (2) was unable to apply the proper burden of proof." Appellant bases his complaints against Crawford on her alleged inability to consider that a party to a felony should not have anticipated a resulting murder when that party was not the actual killer. According to appellant, "the prospective juror described above could clearly not even consider such a position as the mere knowledge of the possession of a gun by a co-defendant would cause this juror to find against any such defendant on the 'should have anticipated' issue."

During voir dire, the prosecutor explained the law of parties to Crawford as stated in §§ 7.01 and 7.02 of the Texas Penal Code.[10] To illustrate the law in its application, the

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[10] Texas Penal Code § 7.01, entitled "Parties to Offenses" provides the following:

> (a) A person is criminally responsible as a party to an offense if the offense is committed by his own conduct, by the conduct of another for which he is criminally responsible, or by both.

prosecutor described a situation in which three individuals conspire to rob a bank using ski masks and guns. In his hypothetical situation, one party waits outside in the "getaway car" while the two others go inside the bank. The second party, on his way to rob the teller, shoots and kills a guard who appears on the scene, while the charged party

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footnote 10 continued

> (b) Each party to an offense may be charged with commission of the offense.
>
> (c) All traditional distinctions between accomplices and principals are abolished by this section, and each party to an offensse may be charged and convicted without alleging that he acted as a principal or accomplice.

Texas Penal Code § 7.02, entitled "Criminal Responsibility for Conduct of Another, "states the following:

> (a) A person is criminally responsible for an offense committed by the conduct of another if:
>
> (1) acting with the kind of culpability required for the offense, he causes or aids an innocent or nonresponsible person to engage in conduct prohibited by the definition of the offense;
>
> (2) acting with intent to promote or assist the commission of the offense, he solicits, encourages, directs, aids, or attempts to aid the other person to commit the offense;
>
> (3) having a legal duty to prevent commission of the offense and acting with intent to promote or assist its commission, he fails to make a reasonable effort to prevent commission of the offense.
>
> (b) If, in the attempt to carry out a conspiracy to commit one felony, another felong is committed by one of the conspirators, all conspirators are guilty of the felony actually committed, though having no intent to commit it, it the offense was committed in furtherance of the unlawful purpose *and was one that should have been anticipated as a result of the carrying out of the conspiracy.*

(emphasis added).

stands at the door. The prosecutor then asked Crawford the following questions:

Q. Even though I haven't shot anybody and I didn't intend for you to shoot anybody, I am guilty of the greater offense because it's in the furtherance of the original crime that was committed and I should have — or a jury could find that I should have anticipated that the higher crime would have been committed. Do you follow me?

A. Yes.

Q. Do you see facts or circumstance in that hypothetical that would make you tend to believe that I should have anticipated that the guard would die or be shot?

A. Well, common sense would tell you that if you have got a gun and you are going to rob, you don't know how to anticipate human behavior. Sometimes they will freeze and be scared, or somebody might decide they have taken their bravery pill and try to be the hero for the day. You have to anticipate that somebody might try something. Common sense should tell you I may be forced to ue it, If you have got a gun, you are going to use it.

Defense counsesl referred to this response during his examination of crawford:

Q. Again, Mr. Wells had given you a hypothetical situation and you had stated that common sense would dictate that if someone had a gun, that the others should have known that he would use it.

Is that a fair —

A. *Or that something could happen and it might be used.*

* * *

Q. Can you ever foresee a situation where the unarmed robber should not have anticipated what was going to happen?

A. No, the unarmed robber — there was a gun. *It can go off* whether he's got the gun in his hands or his partner has it. If the gun is concealed and the other guy didn't know there was a gun, that's a totally different ball game.

Q. Assume that the unarmed robber did know that the other one had a gun.

A. *Then he sould have anticipated it might go off.*

Q. In every situation?

A. Yes, sir. Gun safety teaches you guns are dangerous and *they go off.*

(emphasis added). Appellant then challenged Crawford for cause "based upon the juror stating that she could not follow the law of parties."

A defendant may challenge a prospective juror for cause if she "has a bias or prejudice against any of the law applicable to the case upon which the defense is entitled to rely, either as a defense to some phase of the offense for which

the defendant is being prosecuted or as a mitigation thereof or of the punishment therefor." Article 35.16(c) (2). After reviewing the entire voir dire, we find that the trial court did not abuse its discretion in denying appellant's challenge for cause based on appellant's challenge that Crawford was unable to follow the law of parties, because appellant failed to establish such a bias.

First, defense counsel never attempted to explain to Crawford that the she must base her finding on the evidence and that the State must prove to her beyond a reasonable doubt that the defendant should have anticipated the murder. There is no error in a trial judge's refusal to excuse a prospective juror whose answers are contrary to the law, when the law was not explained to the veniremember and she was not given a chance to say she could follow the law. *See Teague v. State,* 864 S.W.2d 505, 513 (Tex.Crim.App. 1993). (veniremember not informed that law required him to consider age in mitigtion of death penalty was not biased against the law); *Chambers v. State,* 903 S.W.2d 21, 29 (Tex.Crim.App. 1995) (appellant failed to show veniremember biased against law when veniremember was never informed of law requiring him to consider intoxication as mitigating).

Next, appellant incorrectly asserts that Crawford "stated in each instance where the non-trigger man knew the other had a gun she would find that the non-trigger man should have anticipated that it *would* go off *and kill someone.*" (emphasis added). Rather, Crawford merely stated that in such a situation, a defendant should have anticipated that the *gun might go off,* not that another individual *would necessarily be killed.* Contrary to appellant's assertions, veniremember Crawford's entire voir dire does not support

his allegation that she would automatically find in every § 7.02(b) situation that a defendant should have anticipated a murder as a result of a felony attempt. At most, she stated that, based on the detailed hypothetical situation described to her, the defendant should have anticipated that the gun might discharge if the defendant knew his co-conspirator had a loaded gun.

Accordingly, appellant has failed to show Crawford was biased or prejudiced against the law. Because there was no abuse of discretion in denying appellant's challenge for cause, we overrule appellant's twenty-seventh point of error.

Appellant, in his twenty-eighth point of error, complains that venireperson Hinojosa "could not apply the law of parties" and "could not consider mitigation evidence." First, a review of the record shows that venireperson Hinojosa was able to follow the law of parties. Hinojosa showed that she could find either that a defendant should or should not have anticipated a murder, depending on the particular facts and circumstances of a case. Hinojosa's testimony does not support appellant's assertion that she would automatically find a defendant guilty of capital murder "once it was established that any co-conspirator had a gun." The trial court did not abuse its discretion in overruling appellant's challenge for cause on this ground.

Appellant's second allegation against veniremember Hinojosa is that she could not consider mitigating evidence, Honojosa stated that she would consider various factors, such as a defendant's age, mental retardation, and circumstances of the crime, to be mitigating enough to warrant a life sentence; however, she said that she would not consider intoxication or the fact that a defendant had family to be

mitigating factors *per se*. It is clear from Hinojosa's testimony that she would be able to consider and give effect to evidence that she believed to be mitigating. Appellant complains, however, that she would not consider particular evidence to be mitigating *per se*. It is not error for a trial court to overrule a challenge for cause when it is shown that a juror will not or may not give a particular variety of mitigating evidence any consideration. *Johnson v. State*, 773 S.W.2d 322, 330-331 (Tex.Crim.App 1989), *aff'd*, 509 U.S. ____, 113 S.Ct. 2658, 125 L.Ed.2d 290 (1993). Each juror must be able to consider mitigation evidence generally, but the weight each juror chooses to give to particular evidence is left to that individual juror's discretion. *Heiselbetz v. State*, 906 S.W.2d 500, 508-509 (Tex.Crim.App. 1995). Because nothing requires jurors to consider certain evidence to be mitigating as a matter of law, the trial court did not err in overruling appellant's challenge for cause on this ground. Appellant's twenty-eighth point of error is overruled.

Appellant states in his twenty-ninth point of error that the trial court erred in overruling his challenge for cause against veniremember Walters because she "—(1) could not apply the law of parties; and (2) seemed unable to apply the proper burden of proof." During his voir dire examination of the veniremember, appellant informed her of the State's burden of proving every element of the capital murder offense beyond a reasonable doubt, including, in the law of parties context, the element that an accused "should have anticipated" the resulting murder.

The voir dire of venireperson Walters reviewed in its entirety clearly supports the trial court's denial of appellant's challenge for cause. Her testimony shows that she was able

to follow the law of parties and was not predisposed to find a non-trigger defendant guilty of capital murder. Walters asserted that in deciding whether or not a defendant should have anticipated a murder, she would want to know the circumstances of a particular case, and that she could find in at least one situation that a non-killing defendant should not have anticipated a murder, even though he knew that his co-conspirataor had a gun. *Cf. Nichols v. State,* 754 S.W.2d 185, 196-198 (Tex.Crim.App. 1988) (juror challengeable for cause because she could never find a non-trigger defendant guilty of capital murder), *cert. denied,* 488 U.S. 1019, 109 S.Ct. 819, 102 L.Ed.2d 808 (1989), *overruled on other grounds, Green v. State,* 764 S.W.2d 242 (Tex.Crim.App. 1989) (plurality opinion). Appellant's first contention fails.

With respect to his contention that Walters "seemed unable to apply the proper burden of proof," we note that appellant never voiced this allegation at trial and never questioned Walters directly on this subject. *See Cuevas v. State,* 742 S.W.2d 331, 343 n.12, (Tex.Crim.App. 1988), *cert. denied,* 485 U.S. 1015, 108 S.Ct. 1488, 99 L.Ed.2d 716 (1988) (juror must be told what law requires of him before it can be said that he cannot follow it). We overrule appellant's twenty-ninth point of error.

Appellant, in point of error thirty, asserts that the trial court erroneously denied his challenge for cause against prospective juror Miller because she "(1) could not apply the law of parties and (2) could not consider mitigation evidence." Appellant bases his first complaint on Miller's assertion that if an armed robber kills someone during a robbery attempt, an unarmed party to the robbery should always have anticipated that someone would be killed. However, the

veniremember also had indicted earlier that she would weigh all the facts and circumstances before determining if an accused should have anticipated a murder when the accused knew his co-conspirator had a gun. She also stated that in order to make that determination, she would want to know additional facts such as the accused's knowledge of his co-conspirator's murder capabilities. Because venireperson Miller showed that she could follow the law of parties, we find no abuse of discretion in the trial court's decision to overrule appellant's challenge for cause on this ground.

Appellant's complaint that Miller was unable to consider mitigating evidence is also without merit. In response to sometimes confusing questioning, Miller gave contradictory answers regarding her ability to consider and find certain evidence as mitigating. It appears that she was confused about the difference between her ability to consider mitigation evidence generally and her ability to consider or find certain evidence in a particular case to be mitigating *per se*. However, Miller did unwaveringly insist that she would not always answer the mitigation question negatively and could find sufficient mitigatiang circumstances to result in imposition of a life sentence. Although a juror must be able to consider mitigating evidence generally, the weight that each juror gives to particular evidence when determining if sufficient mitigating circumstances exist is left to that individual's discretion. *Heiselbetz,* 906 S.W.2d at 509. In light of the veniremember's entire voir dire testimony, the trial court was justified in his decision. Appellant's thirtieth point of error, therefore, is overruled.

Appellant asserts in his thirty-third point of error that his challenge for cause aagainst prospective juror Houston

was erroneously denied because she was "predisposed to impose the death penalty and was unable to follow the proper burden of proof." Because appellant failed to challenge Houston at trial on the first of these grounds, he preserved error only with respect to his second contention. *See* Tex.R.App.Proc. 52(a). Moreover, although Houston favored the death penalty over life imprisonment for most capital murder convictions, she stated that she would not always rule out life imprisonment and would be able to consider mitigating circumstances.

Appellant also argues that Houston "would require the defendant to offer proof as to why he should receive a life sentence." Under questioning by defense counsel, Houston acknowledged that she would require the defendant to bring forward evidence to show that he should not receive the death penalty. After appellant challenged her for cause, the prosecutor explained to Houston that at punishment, the prosecution still has the burden of proof regarding the special issues, and the defendant does not have to prove anything, including mitigation.[11] After further clarification from the trial court, Houston said that she would not require the defense to prove that she should answer "yes" to the third special issue. A venireperson who equivocates or vacillates in her answer to a question is subject to challenge for cause, at the trial court's discretion. *Perillo v. State*, 758 S.W.2d 567, 577 (Tex.Crim.App. 1988), *cert. denied*, 492 U.S. 925, 109 S.Ct. 3263, 106 L.Ed.2d 608 (1989). Because the record supports the trial court's denial of appellant's challenge for

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[11] While it is true that the State bears the burden of proof regarding the special issues under Article 37.071 §2 (b), we have held that there is no burden of proof with respect to the mitigation issue under Article 37.071 § 2(e). *See Colella v. State*, 915 S.W.2d 834, 845 (Tex.Crim.App. 1995).

cause, we overrule appellant's thirty-third point of error.

B. State's Challenges for Cause

Points of error forty-two and forty-three voice appellant's contentions that the trial court erred in granting the State's challenges for cause against veniremembers Brown and Ester, respectively. In reviewing the trial court's decision to sustain a challenge for cause, this Court asks whether or not the totality of the voir dire testimony supports the trial court's finding that the prospective juror is unable to take the requisite oath and follow the law as given by the trial court. *Chambers,* 866 S.W.2d at 22. Only in the event that a clear abuse of discretion is demonstrated will the trial court's decision be reversed. *Id.*

The State challenged veniremember Brown on the ground that she could not follow the trial court's instruction on the law of parties. Although appellant concedes that Brown stated that she could not follow the law of parties, he argues that she actually was "able and willing" to follow the law. We disagree.

At first, veniremember Brown vacillated in her position regarding her ability to convict someone under the law of parties according to who was questioning her. However, after examination by both sides, she settled into the position that she could not convict someone of capital murder if he did not actually commit the murder. The trial court granted the State's challenge, observing, "... of course I can't read her mind, I can only go by what she said when she answered your questions that she couldn't find him guilty. That was particularly influential on the court." The trial court, which

was in the best position to assess the prospective juror's views, found that Brown's beliefs concerning non-trigger defendants constituted a bias against the law sufficient to impair her performance substantially. *See Nichols,* 754 S.W.2d at 197. We hold, upon viewing the entire voir dire, that the trial court did not abuse its discretion in granting the State's challenge for cause. Appellant's forty-second point of error is overruled.

Appellant, in his forty-third point of error, complains that the trial court erroneously granted the State's challenge for cause against venireman Estes. Appellant argues that because Estes demonstrated that he could answer the special issues under Article 37.071 in such a way that the death penalty would be imposed, he was not challengeable merely because he opposed the death penalty.

Although Estes stated he could answer the punishment questions in a capital murder case based on the presented evidence, he also stated he could never answer the questions in a way that would result in the death penalty. Under appellant's questioning, Estes said that *if* he found there were no mitigating circumstances, he would have to answer the third special issue under 37.071 § 2(e) negatively; however, he expressed doubt that he could ever make that finding. Estes later told the prosecutor that he would always find mitigating circumstances and answer "yes" to the third special issue in order to avoid imposition of the death penalty. At the conclusion of his voir dire, the trial court asked, "Could you ever under any circumstances or fact situation answer these issues in a way that would result in the imposition of the death penalty?" After Estes answered, "No," the trial court sustained the State's challenge.

Under *Wainwright v. Witt*, 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985), a venireperson's views on capital punishment support exclusion for cause only when they would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Id*, 469 U.S. at 424, 105 S.Ct. at ____, 83 L.Ed.2d at 851-852; *McGee v. State*, 774 S.W.2d 229, 235 (Tex.Crim.App. 1989), *cert. denied*, 494 U.S. 1060, 110 S.Ct. 1535, 108 L.Ed.2d 774 (1990). In *Colella v State*, 915 S.W.2d 834, 845 (Tex.Crim.App. 1995), we applied our prior holding in *Staley v. State*, 887 S.W.2d 885 (Tex.Crim.App. 1994), *cert. denied*, ____ U.S. ____, 15 S. Ct. 1366, 131 L.Ed.2d 222 (1995), to the current version of Article 37,071. Thus, even though a veniremember states that he could follow the statutory punishment scheme, he can still be challengeable for cause if he demonstrates that he would answer the statutory issues so that the death penalty either would always or would never result. *Colella*, 915 S.W.2d at 842; *Staley*, 887 S.W.2d at 894. *See also Morgan v. Illinois*, 504 U.S. 719, 112 S.Ct. 2222, 119 L.E.2d 492 (1992) (holding that jurors unalterably opposed to or in favor of death penalty cannot perform their duties in accordance with law, protestations notwithstanding). Estes's answers were sufficient to support the trial court's finding that regardless of the evidence, Estes would always find mitigating circumstances to justify avoiding the imposition of a death sentence. *See Colella, supra.* Because the trial court did not abuse its discretion in granting the State's challenge for cause, we overrule appellant's forty-third point of error.

V. Guilt/Innocence

In point of error twenty-two, appellant complains that the trial court reversibly erred in admitting three autopsy

photographs of the decedent's body into evidence. Specifically, he avers that "the autopsy photographs had only slight, if any, probative value in relation to their prejudicial effect and should have been excluded." According to Rule 403 of the Texas Rules of Criminal Evidence, evidence is admissible unless its prejudicial or inflammatory nature substantially outweighs its probative value. *Etheridge v. State,* 903 S.W.2d 1, 20-21 (Tex.Crim.App. 1994), *cert. denied,* ____ U.S. ____, 116 S.Ct. 314, 133 L.Ed.2d 219 (1995).

The trial court, when balancing the photographs' probative value against any potential unfair prejudice, should consider such factors as their gruesomeness, their size, whether they are in black and white or color, whether they are close-up, and whether the body is naked or clothed. *Long v. State,* 823 S.W.2d 259, 272 (Tex.Crim.App. 1991), *cert. denied,* 505 U.S. 1224, 112 S.Ct. 3042, 120 L.Ed.2d 910 (1992). However, this list is not exhaustive and does not limit the trial court in its determination, as the trial court should also consider additional factors such as the availability of other means of proof and the circumstances unique to each individual case. *Id.*; *Penry,* 903 S.W.2d at 752.

The three photographs in question were taken by the medical examiner before any incisions were made for the internal examination and were admitted into evidence in order to assist the examiner in explaining the three bullet wounds. All are roughly eight inches by ten inches in size. One photograph provides a frontal view of the decedent's naked body; however, the lower half of the photograph is covered. Bullet wounds are visible on the chest and right arm. The other two photographs, which are different close-up views of the decedent's right arm, show where two bullets entered

and exited the body. In those photographs, a two inch ruler was placed next to the wounds for comparison purposes. Although the record is silent as to whether the photographs are in black and white or color, the State concedes in its brief that they are in color.

The three autopsy photographs were probative and relevant to show the wounds that caused the decedent's death and to aid the jury as the medical examiner described each bullet's path through the body. The valuable visual assistance they provided the jury by showing the exact locations of the wounds could not have been replicated by a "skeleton typically found in any science classroom," as suggested by appellant. Finally, the average sized pictures are not particularly gruesome and depict the decedent's body in a clinical, objective setting. After reviewing the three photographs in question, we hold that they did not encourage resolution of material issues on an inappropriate emotional basis and that their probativeness outweighed any alleged unfair prejudice. *See Narvaiz v. State*, 840 S.W.2d 415, 429-30 (Tex.Crim.App. 1992), *cert. denied*, 507 U.S. 975, 113 S.Ct. 1422, 122 L.Ed.2d 791 (1993); *Penry*, 903 S.W.2d at 752. We overrule point of error twenty-two.

Point of error twenty-three voices appellant's contention that the trial court erroneously allowed the medical examiner to give his opinion as to why .22-caliber weapons are often used in homicides. The medical examiner testified during the State's case-in-chief that as a forensic pathologist, he had performed about three thousand forensic autopsies and had supervised or consulted in about ten to fifteen hundred other cases. He further stated that forensic pathologists investigate sudden and unexpected deaths, including deaths

due to violence, accident, homicide, or suicide.

After describing the decedent's three bullet wounds, the examiner testified that the chest wound was from a .22-caliber gun, and that the other two wounds on the right arm were probably from a .22-caliber weapon as well. In addition, he estimated that the decedent was shot from a range of about three feet. After stating that the decedent died as a result of the gunshot wound to his chest, the State asked the following question:

Q. Doctor, in you experience and training and numbers of autopsies that have — that you have performed, do you have an opinion or do you know why 22 caliber weapons are used on so many occasions in hom[i]cides.

[Defense counsel]: Your honor, I'm going to object. That would call for extreme speculation on the part of the witness. There is nothing to establish a foundation that has any relevance to this particular situation.

The Court: Overruled.

A. Well, there are probably a variety of reasons. 22's are frequently cheaper than the larger, fancier guns, they are numerous, readily available, both in legitimate dealers and on black market. But in criminal activity, one of the reasons that they are popular is that the bullets frequently get damaged enough in striking the targets so that they are very difficult to match with the weapon.

> The other larger jacketed bullets will have markings that ballistics analysts that people like Larry Fletcher can look at and fire a subsequent bullet from a suspect weapon and say, yeah, this is the weapon that fired the first bullet, as well as the test bullet. With 22's, the bullets frequently end up damaged enough so that that possibility is out of the window, and that certainly contributes to the motivation of people who would use them as well.
>
> There may be other motives that I don't know about, but those are among the motives.

The Texas Rules of Criminal Evidence govern the admissibility of expert testimony. Specifically, rule 702 states the following:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

The admission of expert testimony lies within the sound discretion of the trial court and will not be set aside absent a showing of an abuse of discretion. *Banda*, 890 S.W.2d at 58-59.

Appellant argues that although the doctor "might have been competent to testify as to how .22 bullets might fragment when hitting a body, he possessed no qualifications to testify that criminals possessed such knowledge and used such guns to prevent identification." We agree. Because of the

examiner's extensive experience in examining bodies in homicide cases, the trial court did not abuse its discretion in allowing the examiner to testify that .22-caliber weapons are frequently used in homicides, and that .22-caliber bullets often extensively fragment to the point at which they are not identifiable. However, the examiner was not qualified to testify about the cost and availability of guns, nor was he qualified to testify as to the motives of criminals. To the extent that the trial court allowed the examiner to testify about these matters, the trial court abused its discretion.

However, our inquiry does not end here, as we must determine whether the admission of the examiner's testimony constituted reversible error. Texas Rule of Appellate Procedure 81(b) (2) provides that an appellate court shall reverse the judgment under review unless the appellate court determines beyond a reasonable doubt that the error made no contribution to the conviction or to the punishment.

Pursuant to *Harris v. State,* 790 S.W.2d 568 (Tex.Cr.App. 1989), in conducting a harm analysis we must consider various factors, such as whether the error might possibly have prejudiced the jurors' decision-making and whether jurors were able to properly apply the law to the facts in order to reach a verdict. We must also isolate the error and all its effects, and then ask whether a rational trier of fact might have reached a different result if the error and its effects had not resulted. *Id.*

The examiner's testimony regarding motives of criminals and cost and availability of .22-caliber weapons was not tied specifically to appellant at trial. In addition, the State did not question the examiner further on those subjects, nor

did it emphasize any of the challenged testimony in arguments during the guilt-innocence or punishment stages of the trial. Further, the bulk of the examiner's testimony was admissible. The inadmissible testimony was not incriminating and appears to be pretty innocuous. After conducting the required *Harris* analysis, we conclude that the erroneous admission was harmless beyond a reasonable doubt. Appellant's twenty-third point of error is overruled.

Points of error one, two, three, ten, and nineteen concern the testimony of State's witness Jason Martin. Appellant, along with Martin and Tommy Perkins,[12] planned to rob the decedent at gunpoint at the entrance to his residence. According to the plan, appellant and Perkins were to ambush the decedent at the entrance gate, bind him with duct tape, and take his money and his truck, while Martin was to wait for them in his own truck in a nearby lot. During the attack, however, the decedent apparently retaliated and shot appellant in the leg. When Martin heard gunfire followed by appellant's cries, he drove away from the scene and eventually returned to his home that night. Perkins also fled the scene and met up with Martin the next morning. The following evening law enforcement officers, responding to reports from residents, found appellant and brought him to a local hospital. After he was released from the hospital, he was arrested and later gave a confession, in which he described the robbery attempt and shooting that occurred on March 12, 1993 and the events leading up to them. In his confession appellant also discussed the involvement of Perkins and

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[12] Perkins was convicted by a jury of capital murder and received an automatic life sentence after the State declined to seek the death penalty. His conviction was afirmed in *Perkins v. State*, 887 S.W.2d 222 (Tex.App. - Texarkana 1994, pet. ref'd).

Martin in those events.

In points of error one, two, and three, appellant contends that Martin's testimony was the fruit of appellant's illegally obtained confession, and that its admission violated Article 38.23, the Fifth and Fourteenth Amendments to the United States Constitution, and Article 1, § 10 of the Texas Constitution, respectively. After a pretrial hearing on appellant's motion to suppress his own confession, the trial court overruled his motion; however, the State ultimately chose not to introduce appellant's confession into evidence at trial.

Pursuant to a plea agreement with the State, Martin testified against appellant during the guilt/innocence portion of appellant's trial. Approximately forty pages into Martin's trial testimony, appellant objected to "the entirety of Mr. Martin's testimony" on the ground that it was a fruit of his illegally obtained confession. The trial court overruled appellant's objection.

First, contrary to appellant's suggestions, an objection specifically challenging the admissibility of Martin's testimony as an inadmissible fruit of appellant's confession was necessary. Appellant's pretrial motion to suppress his own confession required the judge to rule whether or not the confession was obtained in violation of appellant's constitutional rights. The trial court's pretrial ruling on the legality and admissibility of appellant's confession did not automatically extend to any alleged fruits of that confession, including Martin's testimony. *See McMahon v. State,* 582 S.W.2d 786, 793 (Tex.Crim.App. 1978), *cert. denied*, 444 U.S. 919, 100 S.Ct. 238, 62 L.Ed.2d 175 (1979) (holding that the defendants, having unsuccessfully moved to suppress their

confessions before trial, waived contention that alleged fruit of confessions was wrongfully admitted into evidence without any objection to evidence at trial). *See also Gibson v. State,* 516 S.W.2d 406, 409 (Tex.Crim.App. 1974) (noting that admission of fruits of illegal search can be waived without proper objection at trial).

Second, to preserve error properly, appellant's objection to Martin's testimony should have been timely. In order to preserve error on appeal with an objection, the objection must come before the tangible evidence which is clearly objectionable is admitted, or the question manifestly calling for objectionable testimony is answered in front of the factfinder. *Polk v. State,* 729 S.W. 2d 749, 753 (Tex.Crim.App. 1987), *rev'd in part on other grounds,* 749 S.W.2d 813 (Tex.Crim.App. 1988). We have also held that in order to be timely, an objection must be raised at the earliest opportunity, or as soon as the ground of the objection becomes apparent. *Id.* The State argues that appellant waived any error because, by waiting until Martin had testified at length before raising any objections, his objection was untimely.

The ground of appellant's objection, that Martin's entire testimony allegedly was obtained as a result of appellant's illegal confession, became apparent during the pretrial hearing on appellant's motion to suppress his own confession. Further, appellant was put on notice by the State's opening argument that the State would question Martin before the jury. To preserve error properly, appellant should have objected no later than the point at which Martin began his testimony. However, appellant waited until Martin had testified for a considerable period of time before raising an objection and offered no reason for delaying his objection.

See Martinez v. State, 437 S.W.2d 842, 847 (Tex.Crim.App. 1969). Because appellant's trial objection to Martin's testimony was untimely, we hold that appellant failed to preserve error. *See Wheatfall v. State,* 882 S.W.2d 829, 833 (Tex.Crim.App. 1994), *cert. denied,* ____ U.S. ____, 115 S.Ct. 42, 130 L.Ed.2d 644 (1995) (holding that appellant's objection during void dire, raised forty pages after earliest possible opportunity, was untimely). We overrule appellant's first, second, and third points of error.

In his tenth point of error, appellant alleges that the trial court erred in refusing to allow him to question Martin "concerning the amount of time which he believed he would serve under a life sentence for capital murder as such understanding constituted a bias or motive affecting Martin's credibility." The State counters that the trial court correctly refused to allow appellant to cross-examine Martin about his knowledge of parole law. However, after reviewing the record, we note that the trial court *did* allow appellant to question Martin as requested.[13] Because appellant received exactly that which he requested, there is nothing for us to review. *See Purtell v. State,* 761 S.W.2d 360, 372 (Tex.Crim.App. 1988), *cert. denied,* 490 U.S. 1059 (1989); *Easterling v. State,* 710 S.W.2d 569, 580 (Tex.Crim.App.), *cert. denied,* 479 U.S. 848 (1986); *Nethery v. State,* 692 S.W.2d 686, 701 (Tex.Crim.App. 1985), *cert.denied,* 474 U.S. 1110 (1986). Appellant's tenth point of error is overruled.

Appellant, in point of error nineteen, complains that the trial court erred in admitting testimony from Martin that

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[13] For further reference, we direct the parties to volume 25, pages 796-807 of the record.

appellant became violent when he drank whiskey. Martin testified that he had known appellant for around six years. He further stated that he had been around appellant when he was drinking whiskey and had seen how appellant acted when drinking. When asked if appellant gets violent when he drinks, appellant objected to the testimony on the ground that it would call for speculation and opinion from a witness who was not qualified to render such an opinion. After the trial court overruled appellant's objection, Martin answered that appellant acted violently when drinking whiskey.

A lay witness may testify in the form of opinions or inferences when they are rationally based on the witness's perception and are helpful to a clear understanding of his testimony or the determination of a fact in issue. Tex.R.Crim.Evd. 701. Appellant challenges Martin's testimony on the ground that it was not rationally based on his perception. Specifically, appellant argues that although Martin could properly testify that appellant was drunk, Martin was not qualified to testify about what appellant would do when drunk because "[s]uch testimony would be an improper opinion of [appellant's] state of mind." In support of his contention, appellant relies on cases decided prior to adoption of the Texas Rules of Criminal Evidence. *See Witty v. State,* 203 S.W.2d 212, 220 (Tex.Crim.App. 1947) (witness could testify that defendant's wife appeared nervous, but impermissibly expressed opinion to effect that wife appeared to be "expecting something to happen"); and *Stein v. State,* 514 S.W.2d 927 (Tex.Crim.App. 1974) (holding that trial court did not err in preventing testimony that defendant was surprised, because such testimony was speculative). Regardless of the current validity of these prior holdings, Martin's testimony was not speculative and did not concern appellant's

mental or emotional state. Martin testified that he observed appellant's actions when appellant had been drinking and described those actions as violent. Such testimony was rationally based on Martin's perceptions of appellant's actions. We hold that the trial court did not abuse its discretion in allowing the testimony. We overrule appellant's nineteenth point of error.

Appellant's fourth and twenty-first points of error concern the admissibility of a bullet, introduced into evidence as State's exhibit ten, that was surgically removed from appellant's body. The State used the bullet at trial to show that it had been fired from the decedent's weapon. Specifically, in his fourth point of error, appellant argues that the removal and subsequent seizure of the bullet violated his right to be free from unreasonable searches and seizures, as guaranteed by the Fourth Amendment to the United States Constitution and by Article 1, Section 9 of the Texas Constitution. Appellant argues in his twenty-first point of error that the bullet was inadmissible because the State did not properly establish a chain of custody.

The attempted robbery and murder occurred on the evening of March 12, 1993. Almost twenty-four hours later, Officer Jimmy Don Clark and Sheriff B.J. McCoy, responding to reports of an injured man in the area, found appellant not far from where the murder occurred. Appellant appeared tired, hurt, and bloody. McCoy noticed that appellant had been shot and called an ambulance. According to appellant, he had been injured in a dice game. When appellant arrived at the hospital emergency room, Dr. Nardonne, an orthopedic surgeon, examined appellant's bullet wounds and ordered x-rays. Dr. Nardonne determined that there were bone

fragments and a bullet in appellant's knee, and that there was some muscle tissue damage in his thigh from two other bullet wounds. The doctor showed the x-rays to Officer Clark, who was at the hospital during appellant's examination. Although appellant had not yet been arrested for the decedent's murder he was considered a suspect so Clark stood guard over appellant at the hospital. However, Clark also testified that at that point, appellant was free to leave the hospital.

After appellant received a general anesthetic, the doctor surgically removed the bullet and a fair amount of the knee cap that had been damaged beyond repair. He also repaired ligaments in the knee and treated the two bullet wounds on appellant's thigh. After removing the bullet, the doctor handed it to Nurse Peacock, who placed it in a container and gave it to Nurse Walker. Officer Clark testified that Sheriff McCoy had asked him to remain at the hospital in case the doctor wanted him to have the bullet after the surgery. While he was waiting at the hospital, Clark was informed that Dr. Nardonne wanted Clark to come to surgery to get the bullet. Upon his arrival, Nurse Walker gave the bullet to Officer Clark.

For security reasons, Officer Clark placed the bullet, along with appellant's clothes and shoes, inside a room at the hospital. Clark testified that at that point, however, he believed that appellant or his family members were free to retrieve the bullet from the hospital. A hospital security guard locked the room and kept the key until the end of his shift at around 4:00 the following morning. At that time, he left the key with "the late shift PBX operator," who did not testify at appellant's trial. The nursing supervisor

testified that she retrieved the key from the PBX operator around 7:00 to 7:15 a.m., unlocked the door, and gave the items in the room to Oficer Larry Moree after he had presented her with a search warrant. According to Officer Clark, from the time the bullet was placed inside the room until the time Officer Moree executed the search warrant, no law enforcement personnel had access to the room.

Officer Larry Moree, who relieved Officer Clark during the night, executed a search warrant at 7:30 a.m. on March 14 and removed the bullet, clothes and shoes from the locked hospital room. Officer Moree identified State's exhibit ten as the container and bullet which he removed from the hospital room. After taking the items into custody, he placed them in a vault at the Lamar County Sheriff's Department and eventually took the bullet to ballistics expert Larry Fletcher at the forensic science lab in Dallas for testing. Fletcher stated the he initialed State's exhibit ten when he received it from Moree. After discussing general testing procedures, Fletcher described the comparison procedures he followed to determine if State's exhibit ten was fired from State's exhibit seven, the decedent's weapon. Before Fletcher testified about the results of the testing procedures, and before the State offered State's exhibit ten into evidence, appellant objected to the bullet's introduction on grounds that law enforcement officials took possession of the bullet before execution of the search warrant.[14] After hearing testimony outside the jury's

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[14] The State argues that appellant failed to preserve this issue for review because his objection came after the bullet had been discussed in testimony, and because appellant failed to raise this issue in a pretrial motion to suppress. However, we note that appellant objected before the bullet was admitted into evidence. Generally, a defendant's objection concerning admissibility of evidence is timely if it is raised when the contested evidence

presence from law enforcement and hospital personnel, the trial court overruled appellant's objection.

At a suppression hearing, the trial judge is the sole judge of the credibility of the witnesses and of the weight attributable to those witnesses and may believe or disbelieve any or all of a witness's testimony. *Alvarado v. State,* 853 S.W.2d 17, 22-23 (Tex.Crim.App. 1993), citing *Meek v. State,* 790 S.W.2d 618, 620-621 (Tex.Crim.App. 1990). The trial court's findings, both implicit and explicit, should not be reversed absent an abuse of discretion. *Alvarado,* 853 S.W.2d at 23.

In point of error four appellant contests the surgical removal of the bullet as an impermissible search and Oficer Clark's obtaining the bullet from the surgery nurse as an illegal seizure. Because appellant does not argue that the Texas Constitution provides greater protections against unreasonable searches and seizures than the Fourth Amendment, we will review his claims according to federal constitutional principles. *See State v. Toone,* 872 S.W.2d 750, 751-752, n.4 (Tex.Crim.App. 1994), and cases cited therein.

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footnote 14 continued

is offered. *Wilson v. State,* 511 S.W.2d 531, 532 (Tex.Crim.App. 1974). According to appellant, he did not object earlier because he did not object to testimony about his injuries, but to the admission of the bullet into evidence and to testimony regarding the ballistics tests that linked the bullet to the decedent's gun. We decline to hold in this instance that, in order to preserve error regarding the admissibility of the bullet, appellant must have objected as soon as there was any testimony regarding the bullet, or when the State mentioned the bullet during opening statement. *But see* Article 28.01. Because appellant objected before the bullet was admitted into evidence, we will address the merits of his arguments regarding the bullet's admissibility.

Appellant argues that there was no evidence that he consented to the surgery and that even though the bullet was removed by a private party, the surgeon acted as an agent of the State because his primary motivation in extracting the bullet was to provide evidence for law enforcement officers. The Fourth Amendment to the United States Constitution protects against illegal governmental searches and seizures and does not apply to searches and seizures performed by private parties not acting as agents of the government. *Burdeau v. McDowell*, 256 U.S. 465 (1921); and *State v. Johnson*, ____S.W.2d ____ (Tex.Cr.App. No. 610-95, delivered November 20, 1996) (rehearing pending). To determine whether a private party acted as an instrument or agent of the government, the Supreme Court has advocated using the test of whether "in light of all the circumstances, the private citizen must be regarded as acting as an instrument or agent of the state." *State v. Comeaux*, 818 S.W.2d 46, 49 (Tex.Crim.App. 1991) (plurality), quoting *Coolidge v. New Hampshire*, 403 U.S. 443, 487 (1971). Two factors to consider are (1) whether the government knew of and acquiesced in the intrusive conduct, and (2) whether the party performing the search intended to assist law enforcement efforts or to further his own ends. *United States v. Bazan*, 807 F.2d 1200, 1203 (5th Cir. 1986), *cert. denied*, 481 U.S. 1038 (1987). The law does not presume an agency relationship, and the party alleging such a relationship has the burden of proving it. *Alvarado*, 853 S.W.2d at 22-23.

First, contrary to appellant's contentions, there is evidence in the record of his consent to the operation. Prior to appellant's surgery, he signed a consent form authorizing the "surgical removal of bullet from left knee." Appellant introduced the consent form into evidence during a pretrial

hearing on appellant's motion to suppress his confession. Because the consent form was part of the record evidence when the trial court ruled on the bullet's admissibility, the trial court could have relied on it in deciding to admit the bullet into evidence. *See Tex.R.Crim.Evid. 104(a); Article 28.01* § 2. By appellant's own evidence, therefore, the surgical removal of the bullet from his knee was not an impermissible invasion of his body. *See Webb v. State,* 467 S.W.2d 449, 450-451 (Tex.Crim.App. 1971).

Nor can the operation be accurately described as a police search. The record also supports the implied finding that the operation was performed for medical reasons and not for securing evidence against appellant. In support of his contention, appellant points to the presence of law enforcement officers at the hospital, Officer Clark's viewing of x-rays showing the bullet in appellant's knee, the nurse's giving the bullet to Officer Clark, and the 's statement that appellant's condition was not life threatening. However, Officer Clark also testified that he never asked anyone to operate on appellant, and nothing from Dr. Nardonne's testimony suggests otherwise. In addition to removing the bullet, the doctor also removed bone fragments, repaired the damaged kneecap, and cleaned the wounds on appellant's thigh. Medical records also support that the doctor was simply performing a medical operation and was not acting at the behest of law enforcement personnel. Dr. Nardonne stated in a report that appellant was at the hospital "mainly for increasing pain" and that he planned to operate on appellant's knee in order "to remove bullet fragments and treat any injury to the knee."

Thus, the trial court could have found that doctor was

acting as a physician, not as an agent of the police. Because the record supports an implied finding from the trial court that the bullet was removed for medical and not law enforcement reasons, we cannot say that the trial court abused its discretion in impliedly finding that there was no police search or an agency relationship between the doctor and the government. *See Alvarado,* 853 S.W.2d at 23. *See also Comeaux,* 818 S.W.2d at 49-50 (holding physician not agent of government in drawing blood from appellant, even though law enforcement officers were present in the hospital when blood was drawn and were interested in the fruits of seizure). Further, because the doctor was not acting as an agent of the State, appellant's constitutional protections against unreasonable searches and seizures do not apply to the doctor's actions. *Id.* at 50.

Appellant next contends that even if the surgical removal of the bullet was reasonable, Officer Clark unreasonably seized the bullet outside the surgery room before the search warrant was issued. The State counters that the bullet was ultimately under the hospital's custody and control until the search warrant's execution the following morning; therefore, it concludes, there was no governmental seizure of the bullet prior to the warrant's execution.

The United States Supreme Court has held that a "seizure" of property occurs when "there is some meaningful interference with an individual's possessory interests in that property." *U.S. v. Jacobson,* 466 U.S. 109, 113-114 (1984). Recently, the Court held that improper seizures under the Fourth Amendment can occur when proterty interests only are affected, even without implication of any privacy interests. *Soldal v. Cool County, Ill.,* 506 U.S. 56 (1992). Because

the State conceded at trial that appellant had a possessory interest in the bullet and does not argue otherwise in its brief on appeal, we do not address this issue and assume only *arguendo* that such an interest existed.

Appellant relies solely on our plurality holding in *Comeaux, supra*, in support of his contention that Officer Clark's actions constituted an illegal, warrantless seizure. He asserts that "[t]he hospital had no independent motive to allow the officer to lock the bullet in a room and guard the same until a search warrant arrived, and concludes that Clark's actions constituted an illegal warrantless seizure.

In *Comeaux*, we held that a state trooper's warrantless search and seizure of a defendant's blood sample violated his constitutional rights against unreasonable searches and seizures. Before we reached our holding, however, we first had to find that there was state action involved when the officer obtained the blood sample. *See Id.*, 818 S.W.2d at 46, n.5. In that case the defendant, a motorist, was taken to a hospital following a fatal automobile accident. *Id.* at 48. While the defendant was at the hospital, his attending physician ordered a blood sample taken for medical treatment purposes. *Id.* at 48-49. A law enforcement officer at the hospital requested a portion of the blood sample from the nurse on duty, but she refused. *Id.* The officer then presented the nurse with a "Mandatory Authorization"form directing her to give the officer a blood sample. *Id.* Only after the nurse received the form did she provide a blood sample to the officer. *Id.* Based on these facts, we held that the nurse, who lacked an independent motive to turn over the sample to the officer, "was acting solely at the behest of police authority." *Id.* at 51.

In contrast, Officer Clark's testimony in the case at bar supports that Clark was a passive recipient of the bullet. He testified that he never requested the doctor or any other hospital personnel to give him the bullet. Rather, he stated that he was summoned to the operating room after the surgery at the surgeon's request and was handed the bullet by an attendant nurse. Clark's presence at the hospital, his knowledge of the bullet's presence in appellant's knee, and his orders to remain at the hospital during the surgery in case the doctor wanted him to have the bullet, do not amount to the level of assertion of authority and subsequent acquiescence that were present in *Comeaux*. The record reasonably supports the conclusion that there was not attempt by Officer Clark or any other law enforcement officers to coerce, dominate, or direct the actions of any hospital personnel.

Even if the trial judge had found there was State action, the record supports an implied finding that there was no "meaningful interference" with appellant's property interests in the bullet, once Officer Clark received it from the nurse. In *Comeaux*, there was undoubtedly a seizure at the point in which the officer obtained the blood sample, because the officer exerted complete control over the sample by sending it to a state pathology lab to have it chemically analyzed for blood-alcohol content. In the present case, however, the degree of state control over the bullet, after receiving it from the nurse, was minimal in comparison. Once the nurse handed him the bullet, Clark did not exert any control over it by keeping it on his person, having it tagged as evidence, sending it to the police lab for comparison testing, or removing it from the premises of the hospital. Rather, he placed it inside a locked room at the hospital, to which only hospital

personnel and no law enforcement officers had access. Further, Clark testified that at that point, he believed that appellant or his family members were free to retrieve the bullet from the hospital. Clark's actions did not amount to any "meaningful interference" by the State with appellant's assumed property interests in the bullet. Because appellant has not shown that there was any state search or seizure prior to the search warrant's execution, the exclusionary remedy of the Fourth Amendment does not apply. We overrule appellant's fourth point of error.

In point of error twenty-one, appellant contends that the trial court erred in admitting the bullet into evidence because the State failed to establish a proper chain of custody. For evidence to be admissable, it first must be relevant. Tex.R. Crim.Evid. 402. When the relevancy of any evidence depends on its identity, source, or connection with a particular person, place thing or event, that evidence must be authenticated or identified. *See* Goode, Wellborn & Sharlot, *Texas Practice: Texas Rules of Evidence: Civil and Criminal* § 901.1, at 192 (2d ed.1993). Texas Rules of Criminal Evidence 901(a) states that the authentication or identification requirement "is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." *See also* Tex.R.Crim.Evid. 104(b). Because questions of authenticity or identification are preliminary questions of fact that are determinative of conditional relevancy, they are generally for juries to decide. Goode, *supra*, at 191-192. The judge's role, therefore, is to determine whether there is evidence sufficient to support a jury's finding that the proffered evidence is what its proponent claims it to be. *Id.*

Establishing a chain of custody aids in identifying evidence because is demonstrates that the evidence admitted at trial is what its proponent claims it to be. *Id.* § 901.3, at 194. *Compare Reed v. State,* 811 S.W.2d 582, 587 (Tex.Crim.App. 1991). A chain of custody consists of the testimony of each person who had custody of the item of evidence, from the time of its discovery to initial connection with the case to the time of its introduction at trial. Goode, *supra,* at 194.

In this case, the State's needed to establish a chain of custody in order to show that State's exhibit ten was the same bullet that was removed from appellant's knee. Appellant claims that the chain was irreparably broken because some of the witnesses could not positively identify State's exhibit ten as the container and bullet they had seen and handled, and because the hospital PBX operator did not testify and confirm whether or not anyone had access to the hospital room during the three hours that he had the key to the room.

Appellant relies on this Court's opinion in *Easley v. State,* 472 S.W.2d 128 (Tex.Crim.App. 1971) to support his premise that there was a fatal break in the custodial chain. The decision in *Easley* was based on a combination of particular circumstances, which included a significant period of time in which the unmarked evidence was in control of unknown persons. *Id.* at 129. In the case at bar, however, there was testimony of the bullet's location from the time it was removed from appellant until after Officer Fletcher tested it for comparison purposes and returned it to Officer Moree. Although the PBX operator did not testify, testimony from Officer Moree and the nursing supervisor established that he had the key to the hospital room with the bullet for approximately three hours. There was no testimony or

suggestion that during those hours someone unlocked the room or tampered with the bullet.

Appellant also points to the fact that witnesses from the hospital could not positively identify State's exhibit ten as the identical bullet that they saw or handled, However, we have held that a witness's inability to identify evidence positively does not render evidence inadmissible. *Jones v. State,* 617 S.W.2d 704, 705 (Tex.Crim.App. 1981). *See also Hammett v. State,* 578 S.W.2d 699, 711 (Tex.Crim.App. 1979), *cert. dismissed,* 448 U.S. 725 (1980) (witness could not positively identify State's exhibit as the same pistol he received from appellant). We note, however, that at least one witness, Officer Moree, did testify that exhibit ten was the same bullet he seized when he executed the search warrant.

In order for State's exhibit to be admissible, the State had to provide evidence sufficient to support a finding that State's exhibit ten was the same bullet that was removed from appellant's knee. *See U.S. v. White,* 569 F.2d 263, 266 (5th Cir.), *cert. denied,* 439 U.S. 848 (1978). Any minor theoretical breaches in the custodial chain or any question of positive identification of physical evidence was a matter for the jury to solve. *See Id.; Jones,* 617 S.W.2d at 705 (objection based on break in chain of custody went to weight and not to admissibility). We hold that the trial court did not abuse its discretion in admitting State's exhibit ten into evidence and overrule appellant's twenty-first point of error.

VI. Punishment

Points eleven through seventeen address appellant's complaints regarding the admission of evidence of various prior convictions at the penalty phase of his capital murder

to punishment proceedings, the trial court held a hearing, out of the jury's presence, concerning the admissibility of State's exhibits 49 through 57, which the State proposed to introduce as evidence of his prior convictions. Appellant raised several challenges to the validity of the prior convictions, which the trial court overruled. After the jury was seated, the State offered into evidence exhibits 50 through 57.

Evidence showing valid prior convictions may be admitted at the punishment phase of a capital trial. *Muniz v. State,* 851 S.W.2d 238, 255 (Tex.Crim.App.), *cert. denied,* ____U.S.____, 114 S.Ct. 116, 126 L.Ed.2d 82 (1993). *See also* Article 37.071 § 2(a). Just as a defendant may collaterally attack a prior conviction alleged for enhancement if it is void, a capital defendant may attack evidence of a void prior conviction offered at punishment in his capital murder trial. *See Galloway v. State,* 578 S.W.2d 142, 143 (Tex.Crim.App. 1979) (regarding collateral attacks of prior convictions alleged for enhancement); *Muniz,* 851 S.W.2d at 255-256 (addressing merits of defendant's attack regarding validity of prior conviction introduced at punishment in capital murder trial).

A collateral attack of a prior conviction introduced at punishment in a capital murder trial, as in a collateral attack through hebeas corpus, is limited to jurisdictional defects, or denials of fundamental or constitutional rights. *See Ex parte Tovar,* 901 S.W.2d 484 (Tex.Crim.App. 1995); *Ex parte Banks,* 769 S.W.2d 539, 540 (Tex.Crim.App. 1989). Lesser infirmities, including insufficiency of evidence and irregularities in the judgment or sentence, may not be raised in a collateral attack. *Galloway,* 578 S.W.2d at 143. *See also Bowles v. State,* 550 S.W.2d 84, 87 (Tex.Crim.App. 1977) (judgment or sentence containing an irregularity which may be reformed on appeal or by nunc pro tunc entry is not void

and may not be collaterally attacked).

When a capital defendant challenges the validity of a prior conviction introduced at punishment under Article 37.071, the burden is upon the defendant to establish that it is void, as in other collateral attacks. *West v. State,* 720 S.W.2d 511, 519 (Tex.Crim.App. 1986), *cert. denied,* 481 U.S. 1072 (1987). If a defendant establishes that a prior judgment of conviction is void, that judgment does not constitute proper evidence. *Id.* at n.10.

In his eleventh point of error, appellant contends that the trial court erred in admitting into evidence exhibit 49 at punishment because it contained evidence of a void conviction. As the State correctly maintains, however, exhibit 49 was not admitted into evidence before the jury and is not included in the volume of exhibits. Therefore, we overrule appellant's eleventh point of error.

In his twelfth point of error, appellant contends that the trial court erred in admitting State's exhibits 50 and 51. In cause number 10,272 appellant was convicted of burglary. Exhibit 50 consists of a copy of the indictment, judgment, and sentence in cause number 10,272; exhibit 51 is appellant's pen packet for the same conviction. Appellant argues that the trial court erred in admitting exhibits 50 and 51 because the conviction in cause number 10,272 is void.

Appellant raises five separate contentions with respect to this burglary conviction.[15] First, appellant complains that

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[15] Appellant was convicted and sentenced in this cause in August of 1970, as a result of a plea agreement.

there was no stipulation of evidence supporting his conviction, as required by Article 1.15. The judgment of conviction contained in exhibit 50 states, "And the Court having heard all the evidence submitted for the State and the Defendant and argument of counsel is of the opinion and so finds that the said Defendant is guilty ...." We further note for purposes of the hearing on the admissibility of State's exhibits 50 and 51, appellant introduced a "Waiver of Trial by Jury, Ten Days to Prepare for Trial and Agreement to Stipulate Testimony," in which he agreed to stipulate witness testimony into the record. Clearly, nothing has been presented to overcome the presumption of the regularity and accuracy of the court records. *Harvey v. State,* 485 S.W.2d 907 (Tex.Crim.App. 1972). *Cf. Ex parte Aaron,* 691 S.W.2d 680, 684 (Tex.Crim.App. 1985) (absent a showing of harm, valid conviction could not be set aside on collateral attack merely because trial court did not sign defendant's waivers and consent to stipulated evidence as required by Article 1:15, when evidence showed trial judge in fact approved defendant's waivers and consented to stipulate evidence).

Second, appellant contends that he was not admonished as to the range of punishment for the offense and supports his allegation with the fact that such admonishment does not appear on the face of the documents showing his conviction. In support of his contention that "failure to admonish the defendant as to the range of punishment provided by law within which the Court assesses punishment upon a guilty plea is fundamental error, " appellant cites *Walker v. State,* 524 S.W.2d 712 (Tex.Crim.App. 1975) and *Reed v. State,* 500 S.W.2d 1137 (Tex.Crim.App. 1973), *overruled by Ex parte Taylor,* 522 S.W.2d 479 (Tec.Crim.App. 1975).

Contrary to appellant's asertions, the record does contain evidence that he was properly admonished. Although the punishment range is not specifically set out on the face of the judgment and sentence, the judgment of conviction does state that upon entering his guilty plea "the said Defendant was admonished by the Court of the consequences of said plea ...." Appellant was convicted of this offense prior to 1975, at which time Article 26.13 required that "[i]f the defendant pleads guilty, or enters a plea of nolo contendere, he shall be admonsihed by the court of the consequences;...."[16] The fact that the range of punishment does not appear on the face of the judgment does not mean that appellant was not admonished of such. At the time of appellant's conviction, recital of the appropriate punishment range was not required on the face of the documents of his conviction. Because the judgment recites that appellant was properly admonished, and because the judgment is not defective for failing specifically to include the range of punishment, appellant has not overcome the presumption of regularity regarding the judgment of conviction. *See State v. Smith,* 683 S.W.2d 393, 407 (Tex.Crim.App. 1984).

Even had there been such a requirement, the failure to adhere to a legislative directive or mode of proceeding designed to safeguard a constitutional right will be cognizable in a collateral attack only when the omission results in the denial of a constitutional protection. *Ex parte Sadberry,* 864 S.W.2d 541 (Tex.Crim.App. 1993). Because appellant does not allege that he was prejudiced or injured in any way, his claim must fail. *See Ex parte Taylor,* 522 S.W.2d at 479.

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[16] Article 26.13 was amended in 1975 explicitly to privide that a defendant must be admonished as to the range of punishment for the offense.

Third, appellant asserts that his prior conviction is invalid because there was no signiture from the district clerk on the document showing his sentence. Even if there were no signature, appellant's assertion that this error rendered his conviction void has no merit. Appellant has not shown why this alleged error was not simply a curable irregularity, nor has he alleged that either the error was fundamental or of constitutional magnitude, or that it resulted in harm. *See Bowles,* 550 S.W.2d at 87.[17]

Fourth, appellant incorrectly asserts that State's exhibit 51 "contained no sentence in regard to the conviction." However, as pointed out above, the pen packet includes a copy of appellant's sentence.

Finally, appellant insists that "the doctrine of judicial estoppel" operated to prevent the State from introducing this prior conviction at his capital murder trial. Appellant relies on an unrelated indictment out of Lamar County for "felon in possession of a firearm, habitual criminal." In that indictment, the State had alleged two prior Hunt County convictions, including his conviction in cause number 10,272, in support of the allegation that appellant had been convicted of a felony prior to the commission of the Lamar County offense. The Lamar County indictment was later dismissed on the State's motion for the reason that it was "based upon a void previous conviction." Appellant avers that because the State asserted that one of those convictions was void in its motion to dismiss the Lamar County indictment, "the State

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[17] In any event, we note that although State's exhibit 50 contains a duplicate copy of his sentence that does not include the clerk's signature in the provided space, State's exhibit 51 contains what appears to be an original copy of the sentence that bears the appropriate signature.

was judicially estopped to deny the voidness of at least one of the prior conviction from Hunt County" in his capital murder trial. Therefore, he continues, "the prior conviction described in State's Exhibits 50 and 51 were [sic] void and should hot have been admitted into evidence."

At the hearing before punishment in the present case, the county attorney who signed the motion to dismiss the Lamar County indictment testified that he had moved to dismiss the firearms possession indictment because, as neither of the Hunt County convictions was a violent burglary, he could not prove a prior violent conviction, "which was necessary for convicting Mr. Vickers on [the Hunt County] charge ...." He also asserted that, in the motion to dismiss he "didn't intend to comment on the validity of the prior conviction."

In support of his contention, appellant provides only one authority, the Texas Supreme Court case of *Long v. Knox*, 155 Tex. 581, 291 S.W.2d 292 (1956). Appellant provides no argument explaining why or how we should apply this doctrine in a criminal matter. We decline to make appellant's legal arguments for him. Because appellant has not shown that his burglary conviction in cause number 10,272 was void, we overrule his twelfth point of error.

In point of error thirteen, appellant contends that State's exhibits 53 and 54 were inadmissible. State's exhibits 53 and 54 are copies of documents pertaining to appellant's prior 1974 conviction in cause number 11124, in which appellant's prior 1974 conviction in cause number 11124, in which appellant pled guilty to the offense of "burglary with [the] intent to commit theft" and received a sentence of three

years. Appellant contests this conviction on four grounds.

In his first ground, appellant concludes, with no additional argument or explanation, that "a fatal variance existed between the indictment and the judgment" because "the indictment against [him] clearly described an attempted burglary while the conviction was for burglary." Appellant has not sufficiently presented this issue for our review, and we decline to address it. *See* Tex.R.App.Proc 74(f).

Appellant's second complaint regarding his prior conviction in cause number 11124 is that "[t]he evidence was insufficient to support the conviction." Sufficiency of the evidence is not a matter that can be raised in a collateral attack. *Galloway,* 578 S.W.2d at 143; *Owens v. State,* 540 S.W.2d 324 (Tex.Crim.App. 1976). *See also Ex parte Lyles,* 168 Tex.Crim. 145, 323 S.W.2d 950 (1959) (guilty plea not subject to post-conviction attack regarding sufficiency of evidence to support plea), *but see State ex. rel. Holmes v. Court of Appeals,* 885 S.W.2d 389 (Tex.Cr.App. 1994).

Third, appellant contends that his conviction is void because of a "[v]ariance between judgment and sentence." Appellant states that on a copy of his judgment contained in the pen packet, a typed entry of "Three (3) years" is crossed out, and "Twelve (12) years" is handwritten above it; and on the copy of his sentence in the same pen packet, the reverse is true. Appellant, citing *Rose v. State,* 499 S.W.2d 12 (Tex.Crim.App. 1973), argues that his sentence is uncertain and, therefore, void. However, after reviewing the record, we note that the sentence is discernable and definite.[18]

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[18] Another copy of the sentence, which was certified on a date later than the altered copies, reflects the sentence as "Three (3) years." In addition, the docket sheet also reflects that the sentence was for "a term of 3 years."

Appellant, in his final attack on the validity of the prior conviction, presents a vague "ineffective assistance of counsel" claim that is not sufficiently argued, in that it cites no cases and alleges no specific occurrences of ineffective assistance. This ground is presents nothing for appellate review. *See* Tex.R.App.Proc. 74(f). Because appellant has failed to show that his prior conviction in cause number 11124 is void, we overrule his thirteenth point of error.

In his fourteenth point of error, appellant contests the validity of his prior conviction in cause number 11128, in which he pled guilty to being a felon in possession of burglary tools. He contends that the trial court reversibily erred in admitting State's exhibits 52 and 54, which were introduced as proof of the conviction. Exhibit 52 contains a copy of the information, judgment of conviction, and sentence in cause number 11128, and exhibit 54 is the pen packet for cause numbers 11128 and 11124.

First, appellant reurges the same "judicial estoppel" contention that he raised in his twelfth point of error without presenting any new arguments. As we stated above, appellant has not shown us any reason for applying this "doctrine" to criminal cases, and we decline to do so.

Second, appellant complains that his conviction was invalid because of the "failure of [the] jurat to indicate who swore to the complaint." Contrary to appellant's claim, however, the name and signature of the complainant appear in a copy of the complaint which appellant introduced for purposes of the hearing.

Third, appellant contends that his conviction was

invalid because the information "did not set forth the underlying conviction showing that the accused was a felon." The then applicable statute, former Article 1402b of the Texas Penal Code, included the element that an accused must be "any person who has been convicted of a felony..." The information and complaint included this element, by alleging that on or about the 23rd day of November, 1973 appellant, "being a person who had theretofore been convicted of a felony...[possessed certain burglary tools] ... under circumstances evincing an intent to use and employ the same." Appellant, in pleading guilty to the offense as alleged, admitted before the trial judge that when he possessed the burglary tools as alleged, he was "a person who had theretofore been convicted of a felony." It was sufficient for the State to charge that appellant had been convicted of a felony prior to the commission of the primary offense, as that is what the statute required. Any lack of specificity was not a jurisdictional matter and did not render the conviction void. *See Dennis v. State,* 647 S.W.2d 275, 278-279 (Tex.Crim.App. 1983).

Fourth, appellant asserts that the plea in cause number 11128 was improperly accepted because his stipulation raised a defensive issue. Appellant bases his claim on testimony accompanying his guilty plea, in which he answered of "no" to defense counsel's question, "Have you ever been convicted of a felony in this or any other state?" Under examination by the district attorney, however, appellant admitted that he was a person who had been convicted of a felony. When a defendant pleads guilty before the trial court and evidence might reasonably and fairly raise an issue of fact as to his guilt, the trial judge, without having to withdraw the defendant's guilty plea, may decide the issue by finding the defendant guilty or not guilty as he believes the facts require.

Moon v. State, 572 S.W.2d 681, 682 (Tex.Crim.App. 1978); *Thomas v. State*, 599 S.W.2d 823, 824 (Tex.Crim.App. 1980).

Fifth, appellant challenges the validity of his convictions on the ground that the statute under which he was convicted was unconstitutionally void for vagueness. This Court held in *Logan v. State*, 448 S.W.2d 462 (Tex.Crim.App. 1969), that the statute defining the offense of possession of burgulary tools by a convicted felon, former Article 1402b of the Texas Penal Code, was not so vague and indefinite as to be unconstitutional. We see no reason to revisit that holding here. Because appellant has not shown that his prior conviction in cause number 11128 was void, we overrule his fourteenth point of error.

In his fifteenth point of error, appellant complains that the "trial court erred in admitting into evidence State's exhibit number 55 is a copy of a federal judgment of conviction and sentence for possessing firearms as a convicted felon. Appellant does not assert that he was not a convicted felon at the time he possessed firearms; rather, he argues that because the four prior convictions addressed in points of error eleven through fourteen were void, his federal firearms conviction was, therefore, void as well. Because we have not held any of those four prior convictions to be void, appellant's argument has no merit. We overrule point of error fifteen.

In point of error sixteen, appellant's contends that his 1979 arson conviction, evidenced by State's exhibit 56, was void because of ineffective assistance of counsel at trial and on appeal. Appellant complains that his appellate counsel was ineffective because he failed to argue appellant's appeal orally before the Court of Criminal Appeals. He also asserts

that his trial counsel was ineffective for failing "to attempt to quash the indictment as the same did not allege the manner and means by which the alleged arson occurred."

To show counsel at either stage was ineffective, a defendant must show that his attorney's performance was deficient because it fell below an objective standard of reasonableness, and that there is a reasonable probability that, but for his counsel's errors, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 694 (1984); *Hernandez v. State*, 726 S.W.2d 53 (Tex.Crim.App. 1986). In order to prevail, a defendant must prove ineffective assistance of counsel by a preponderance of the evidence. *Rodriguez v. State*, 899 S.W.2d 658, 665 (Tex.Crim.App.), *cert. denied*, ____U.S.____, 116 S.Ct. 385, 133 L.Ed.2d 307 (1995), citing *More v. State*, 694 S.W.2d 528, 531 (Tex.Crim.App. 1985).

First, we note that there is no evidence in the record to support appellant's assertion that his attorney on appeal failed to attend oral argument. Appellant's allegations of ineffective assistance will be sustained only if they are firmly founded in the record. *Rodriguez*, 899 S.W.2d at 665, citing *Smith v. State*, 676 S.W.2d 379, 385 (Tex.Crim.App. 1984), *cert. denied*, 471 U.S. 1061 (1985). Thus, appellant has failed to show that his counsel on appeal was ineffective.

Second, although the record does support his contention that his trial counsel could have moved to quash the indictment, appellant fails to argue how this single incident rendered his trial counsel's performance deficient. Whether the *Strickland* standard has been met is judged by the totality of the representation rather than by isolated acts or

omissions of trial counsel. *Rodriguez*, 899 S.W.2d at 665. In addition, appellant has not alleged or shown, as required by the second *Strickland* prong, that the result of his trial would have been different had his trial counsel filed a motion to quash. Because appellant has not met his burden of proving that his counsel at trial or on appeal was ineffective, we overrule his sixteenth point of error.

In point of error seventeen, appellant contends that "[t]he trial court erred in admitting into evidence State's exhibit 57 which contained a prior conviction[,] as the use of such evidence was contrary to the terms of the plea agreement that resulted in this prior conviction." State's exhibit 57 consists of documents relating to appellant's 1991 conviction for conspiracy to commit arson in cause number 13647.

Appellant's conviction resulted from a plea agreement entered into by appellant, the State, and the federal government. According to the agreement, appellant promised to provide information about a murder in exchange for the dismissal of pending state and federal charges including arson and murder. In return, appellant was promised immunity from the use of that information in any criminal prosecution.[19] In addition, appellant agreed to plead guilty to a single State charge of conspiracy to commit arson with a

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[19] During the prepunishment hearing, appellant introduced a copy of the agreement which included the following immunity language:

> It is further agreed and stipulated that none of the information provided by Sonny Vickers in the course of his discussion of events with law enforcement officials, giving of testimony, or any other action relevant to this agreement may in any way ever be used against Sonny Vickers in any criminal prosecution, save except as stated herein below.

sentence of five years, with the provision that neither the State nor the federal government would bring any other charges relating to the information he would provide.

Appellant asserts that because his conviction for the conspiracy to commit arson was part of the information he provided under the agreement, "the State could never use that conviction against Vickers in any other criminal prosecution." The State counters that the immunity portion of the agreement did not cover his conspiracy to commit arson conviction.

Contrary to appellant's interpretation of the immunity portion of the agreement, the State did not agree not to use his information in any *other* criminal prosecution; rather, the agreement states that "none of the information provided by Sonny Vickers ... may in any way ever by used against Sonny Vickers in any criminal prosecution ..." Obviously, this language did not comtemplate appellant's conspiracy to commit arson conviction, because it would necessarily have been barred if it had been included. Rather, that charge and conviction were a separate part of the argument and were not meant to be included in "the information provided by Sonny Vickers." It appears that the promise of immunity was intended to protect appellant from any prosecutions that might have arisen from the information about the murder that he was agreeing to divulge.

We note that at punishment, the State introduced copies of the complaint and information, stipulation to evidence, judgment of conviction, and sentence for the arson conspiracy conviction and introduced no evidence before the jury regarding appellant's involvement in the murder, which was

covered by the agreement. We hold that the State did not violate the agreement when it introduced evidence of appellant's conviction for conspiracy to commit arson. We overrule appellant's seventeenth point of error.

In his eighteenth point of error, appellant argues that the admission of his allegedly void prior convictions at punishment, as discussed in points of error eleven through seventeen, violated his Eighth Amendment right against cruel and unusual punishment. Because the trial court did not err in admitting any evidence of appellant's prior convictions, appellant's point of error is likewise without merit. We overrule point of error eighteen.

In points of error thirty-five through forty-one, appellant claims that at punishment, the trial court erroneously admitted testimony from several witnesses regarding his bad reputation for being peaceful and law-abiding. According to Rule 404(c) of the Texas Rules of Criminal Evidence, both the prosecution and the defense may introduce evidence of an accused's character at the penalty phase of an accused's trial. Rule 405(a) governs the use of reputation and opinion testimony to prove character and provides that:

> In all cases in which evidence of character or trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. Provided however that to be qualified to testify concerning the character or trait of character of an accused, a witness must have been familiar with the reputation, or with the underlying acts or information on which the opinion is based, prior to the day of the offense. In all cases where testimony is admitted

> under this rule, on cross-examination inquiry is allowable into relevant specific instances of conduct.

Under Article 37.071, the trial court has wide discretion in admitting or excluding evidence at the punishment stage of a capital murder trial. *Anderson v. State,* 717 S.W.2d 622, 633 (Tex.Crim.App. 1986).

Appellant alleges in point thirty-five that testimony from Tony Trawick, his former federal probation officer, was inadmissible because "the proper predicate for the admission of such evidence was not demonstrated." Trawick testified that he had known appellant for thirteen or fourteen years, and that appellant's reputation for law-abidingness in his residential community was bad. Outside of the jury's presence, Trawick stated that he based part of his testimony on warnings he received from investigative agents prior to his supervision of appellant. Thirteen or fourteen years before appellant's capital murder trial, the agents had warned Trawick that another individual, whom Trawick was supervising at the time, should not be allowed to associate with appellant. In addition to this incident, Trawick testified that his testimony was also based upon his subsequent supervision of appellant, although he could not recall the period of supervision ended.

Appellant objected to Trawick's testimony, stating only: "Your honor, our objection would be Mr. Trawick's opinion is remote. He hasn't heard the reputation discussed in the last 13 or 14 years." Because this was appellant's only trial objection, we will limit our review of appellant's arguments of error accordingly. *See* Tex.R.App.Proc. 52(a).

Testimony about a defendant's reputation for being

peaceful and law-abiding is probative of that defendant's propensity to commit criminal acts of violence. *Id. See also* Article 37.071 § 2(b)(1). Furthermore, this Court has stated that a defendant's reputation for being a peaceful and law abiding citizen *during his whole lifetime* is probative of the issue of his propensity to commit criminal acts of violence. *Barnard v. State*, 730 S.W.2d 703, 722 (Tex.Crim.App. 1987), *cert. denied*, 485 U.S. 929 (1988). (emphasis added).

In *Anderson*, the defendant claimed that a reputation witness based his testimony on events too remote in time to show his current reputation. This Court held that it is not necessary for the State to prove that a witness based his testimony of a defendant's reputation for peacefulness and law-abidingness only upon current observations and conversations with other members of the community. *Anderson*, 717 S.W.2d at 633. In *Bernard*, this Court held that even though reputation witnesses had not seen or heard of the appellant in over fifteen years, there was not error in admitting their testimony. *Bernard*, 730 S.W.2d at 722.

Although *Anderson* and *Bernard* were decided before Rule 405 of the Texas Rules of Criminal Evidence was enacted, the Court's discussion of reputation testimony in those cases is still viable. Therefore, we hold that the trial court did not abuse its discretion in admitting Trawick's testimony.[20] Appellant's thirty-fifth point of error is overruled.

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[20] We add that objections based upon remoteness pertain to the weight, and not the admissibility, of the testimony. *Nethery v. State*, 692 S.W.2d 686, 706-707 (Tex.Crim.App. 1985), *cert. denied*, 474 U.S. 1110, 106 S.Ct. 897, 88 L.Ed.2d 931 (1986).

In his thirty-sixth point of error, appellant contends that the trial court erred in admitting reputation testimony from Karl Louis, the Paris, Texas Chief of Police. Louis testified that he was familiar with appellant's reputation over the last eight years, and that appellant's reputation for being a peaceful and law-abiding citizen in the community was bad. Louis also testified outside the jury's presence that in his personal opinion, appellant was not a law-abiding and peaceful citizen.

On direct examination by the State, Louis testified that he based his opinion about appellant's reputation, as well as his personal opinion of appellant, on appellant's criminal history; however, on re-direct examination, it was established that Louis had discussed appellant's reputation with police officers, attorneeys, and lay persons in Lamar County. Appellant objected on the ground that his prior criminal history was an improper basis for both Louis's testimony about appellant's reputation and for his opinion testimoy. In the jury's presence, however, the State only asked Louis aout appellant's reputation.

We have recognized that a reputation witness's testimony must be based on discussions with others concerning the defendant, or on hearing others discuss the defendant's reputation, and not just on personal knowledge. *Adanandus v. State,* 866 S.W.2d 210, 226 (Tex.Crim.App. 1993), *cert. denied,* ____U.S.____, 114 S.Ct. 1338, 127 L.Ed.2d 686 (1994), citing *Turner v. State,* 805 S.W.2d 423, 429 (Tex.Crim.App.), *cert. denied,* 502 U.S. 870 (1991). Appellant refers us to *Michaell v. State,* 524 S.W.2d 510 (Tex.Crim.App. 1975), in which we held that a police officer was not qualified to testify as to the defendant's reputation because he based his testimony only on the defendant's "rap sheet" and the

facts of the offense and had never discussed that bad reputation with anyone before or after the offense. *Id.* at 513. We note, however, the crucial consideration in that case was *not* that the officer's testimony was based at least in part on Mitchell's prior criminal record, but that it *was not based at all* on conversations with others in the community.

In the instant case, however, Louis testified that he *had* discussed appellant's reputation with other members of the community. Because Louis based his testimony, in part, on conversations he had with other members of the community, he was qualified to testify as to appellant's reputation for being peaceful and law-abiding. *See Martin v. State,* 449 S.W.2d 257 (Tex.Crim.App. 1970) (police officer was qualified to testify about defendant's reputation because he had discussed reputation with other officers, even though also based on defendant's prior criminal record and facts of offense). The trial court did not abuse its discretion in permitting Louis to testify about appellant's reputation. We overrule appellant's thirty-sixth point of error.

In point thirty-seven, appellant alleges that the trial court erroneously admitted reputation evidence from investigator Johnny Maness. Maness testified before the jury that appellant had a bad reputation for being peaceful and law-abiding, that his personal opinion was that appellant was not peaceful and law-abiding, and that appellant's reputation for being dangerous and violent was bad. Appellant argues in his brief that "Maness' testimony was primarily based on his own personal knowledge of [appellant], which is insufficient to support reputation testimony," and that "Maness admitted that he had no such discussion about [appellant's] reputation with members of the general public."

Contrary to appellant's statements, the record reflects that Maness did discuss appellant's reputation with members of the community, including informants and law people within the community. We hold that the trial court did not abuse its discretion in admitting the testimony. *See Turner,* 805 S.W.2d at 430. Appellant's thirty-seventh point of error is overruled.

Appellant next argues points of error thirty-eight through forty-one together, alleging that the trial court erred in admitting reputation testimony from four witnesses who based their opinions, at least in part, on appellant's allegedly void prior convictions. Appellant argues that any reputation testimony based even partly on such void convictions would be tainted and inadmissible. We need not reach the merits of appellant's contention, however, because he failed to prove that any of his prior convictions introduced at punishment was void. *See* points of error eleven through seventeen, *supra.* We overrule points of error thirty-eight, thirty-nine, forty, and forth-one.

In points of error forty-four and forty-five, appellant challenges the constitutionality of Article 37.071 § 2(e), which requires the jury to determine:

> Whether, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life

imprisonment rather than a death sentence is imposed.

In his forty-fourth point of error, appellant argues that "the 'Penry' special issue [21] is facially unconstitutional because it is silent regarding the burden of proof on aggravating and mitigating circumstances." Regarding aggravating circumstances, appellant's argument is untenable, because Article 37.071 § 2(e) does not ask the jury to consider aggravating evidence. *Lawton v. State,* 913 S.W.2d 542 (Tex.Crim.App. 1995), *cert. denied,* ____U.S.____, 117 S.Ct. 88, ____L.Ed.2d____ (1996). In contrast, Article 37.071 § 2(b) does address aggravating circumstances, and Article 37.071 § 2(c) expressly provides that the State carries the burden of proving those special issues beyond a reasonable doubt.

As appellant correctly points out, Article 37.071 § 2(e) does not explicitly assign a burden of proof regarding mitigating evidence. *Barnes v. State,* 876 S.W.2d 316, 330 (Tex.Crim.App.), *cert. denied,* ____U.S.____, 115 S.Ct. 174, 130 L.Ed.2d 110 (1994). Appellant argues that this silence renders Article 37.071 § 2(e) unconstitutional because the statute provides jurors no guidance in deciding the mitigation special issue. In point of error forty-five, appellant extends this argument by alleging that Article 37.071 § 2(e) "is unconstitutional under the eighth and fourteenth amendments to the United States Constitution because it permits the very type of open-ended discretion condemned by the

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21 The Texas Legislature added this provision to Article 37.071 in response to the United States Supreme Court's decision in *Penry v. Lynaugh,* 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989).

United States Supreme Court in *Furman v. Georgia*."[22]

We recently addressed appellant's contentions in *Lawton, supra*, in which we stated the following:

> Appellant also argues, citing *Furman v. Georgia*, 480 U.S. 238 (1972), that the failure of the legislature to assign clear burdens of production and proof regarding Article 37.071 § 2(e) creates an unconstitutional uncertainty in our capital punishment scheme. Appellant's argument confuses the federal constitution's demand that death eligibility be narrowed to a reasonably clear and well defined group of offenses, as in *Furman*, with its damand that individual jurors be allowed to make individualized, well reasoned, moral responses in determining whether factors exist which mitigate against the imposition of the death sentence, as in *Penry*, 492 U.S. 302 (1989). *See Tuilaepa v. California*, ____U.S.____, 114 S.Ct. 2630 (1944) (discussing the constitution's apparently conflicting demands). The federal constitution's requirement of clarity defining death eligibility is not applicable to provisions which allow the jury to consider and give effect to mitigating evidence. *Gregg v. Georgia*, 428 U.S. 153, 199 (1976). In short, *Furman* dealt with untrammeled discretion to impose the death sentence, but the untrammeled discretion to afford life to a death elegible defendant does not offend the United States Constitution.

Id., at 557-58. The failure to define the burdens of production and persuasion in Article 37.071 § 2(e) does not render

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[22] *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972).

it or our capital punishment scheme constitutionally infirm. *Id.* Moreover, the jury's discretion to decide whether circumstances exist which mitigate against the imposition of the death penalty does not run afoul of the federal constitution's proscription against the untrammeled discretion to impose the death penalty. *Lawton, supra.* We overrule points of error forty-four and forty-five.

In his forty-sixth point of error, appellant contends that "the evidence offered at trial was constitutionally insufficient to support the jury's negative answer" to the mitigation issue. Appellant urges this Court to engage in a sufficiency analysis of the jury's answer to the special issue on mitigation. "Mitigating evidence" is defined only as "evidence that a juror might regard as reducing the defendant's moral blameworthiness." Article 37.071 § 2(f)(4). There is no *per se* evidence that must be viewed as creating a mitigating effect; rather, what is mitigating is left to each individual juror's own determination. *Colella, supra.* Even if jurors accept evidence offered as mitigating to be factually true, they may nonetheless decline to give that evidence any mitigating weight. *Banta,* 890 S.W.2d at 54.

Because weighing mitigating evidence is a subjective determination undertaken by each individual juror, the jury's answer is logically unreviewable for rationality. Furthermore, no burden of proof exists for either the State or the defendant to prove or disprove any mitigating evidence. *Colella, supra.* We decline to review the evidence for sufficiency and defer to the jury's conclusion that the evidence was not sufficient to warrant a sentence of life imprisonment. *Id.* We overrule appellant's forty-sixth point of error.

In point of error forty-seven, appellant avers that Article 37.071 § 2(f) (4)'s definition of mitigating evidence is facially unconstitutional because it limits juror's consideration of mitigating evidence "to factors that render a capital defendant less morally 'blameworthy' for commission of capital murder." Mitigating evidence" is not concretely defined in Texas's capital sentencing scheme; rather, whether or not evidence is mitigating depends on the individual assessment of each particular juror. *Colella, supra.*

Article 37.071 § 2(e) recites the mitigation special issue that the jury must answer at punishment, after having affirmatively answered the special issue or issues under Article 37.071 § 2(b):

> Whether, taking into consideration *all* of the evidence, *including* the circumstances of the offense, the defendant's character and background, *and* the personal moral culpability of the defendant, there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than a death sentence be imposed.

(emphasis added). Article 37.071 § 2(f) (4) does not provide a specific definition of mitigating evidence but requires "that in answering the issue submitted under Subsection (e) of this article, the jury ... (4) shall consider mitigating evidence to be evidence that a juror *might* regard as reducing the defendant's moral blameworthiness." (emphasis added). There is no *per se* evidence that a juror must or must view as mitigating against imposition of the death penalty. Instead, the consideration and weighing of mitigating evidence is a

subjective, unrestricted determination performed by each individual juror. *See Colella, supra: Lawton, supra:* and *Banda*, 890 S.W.2d at 54. We hold that Article 37.071 § 2(f) does not unconstitutionally narrow the jury's consideration of mitigating evidence to factors pertaining only to the defendant's moral blameworthiness. *See Lawton, supra*, holding that Article 37.071 §§ 2 (e) and 2(f) are not in conflict with federal constitution).[23] We overrule appellant's forty-seventh point of error.

In his combined arguments supporting points of error forty-eight and forty-nine, appellant contends that 'Texas' unstructured sentencing scheme is unconstitutional because it does not permit *meaningful appellate review,* which is not only required by (Article 44.251[24]] but also is a prerequisite

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[23] Furthermore, appellant premises his arguments on the fact that the jury received Article 37.071 § 2(f)'s definition of mitigating evidence, when it should have received the following instruction regarding mitigating evidence:

> A mitigating circumstance may include but is not limited to any aspect of the defendant's character, background, records, emotional instability, intelligence or circumstances of the crime, which you believe would make a death sentence inappropriate in this case.

The jury received an identical instruction, withh the sole exception that it included the defendant's family situation as a possible mitigating circumstance. Because the jury received an almost identical instruction that appellant now urges should have been given, he cannot show that he was harmed.

[24] Article 44.251 (a) states the following:

> (a) The court of criminal appeals of confinement in the institutional division of the Texas Department of Criminal Justice for life if the court finds that there is insufficient evidence to support ... a negative answer to an issue submitted to a jury under Article 37.071 (e) of this code.

to a constitutionally implemented capital sentencing scheme." (emphasis supplied by appellant). We addressed these same arguments in *Lawton, supra,* and direct appellant to our holdings and explanations in that case.

See also McFarland v. State, 928 S.W.2d 482, 498-99 Tex.Cr.App. 1996). Because appellant raises no novel argument to persuade us to revisit these holdings, we overrule his forty-eighth and forty-ninth points of error.

In point of error fifty, appellant argues that although the United States Supreme Court has held that the Eighth Amendment does not require a proportionality review of a defendant's death sentence, the Fourteenth Amendment's due process clause does so require. In support of his contention, appellant relies on *Honda Motor Co., Ltd. v. Oberq,* ____U.S.____, 114 S.Ct. 2331, 129 L.Ed.2d 336 (1994), in which the United States Supreme Court held that Oregon's denial of judicial review of the size of juries' punitive damage awards in civil cases violated the Fourteenth Amendment's due process protection against arbitrary deprivations of liberty or property. *Id.,* at 2340-2341. Appellant argues only that "if such appellate review is required by the due process clause in civil cases, it is required *a fortiori* in death penalty cases." Appellant concludes by insisting that "this Court must, in every death penalty case, determine whether a particular death sentence is 'excessive' or 'disproportionate.' Because appellant provides no argument to support his conclusions, his point of error is inadequately briefed and presents nothing for review. Tex.R.App.Proc. 74(f). We have also rejected the same claim in *Morris v. State,* ____S.W.2d____, (Tex.Cr.App. No. 71,799, delivered September 11, 1996, slip op. at 7-8) (rehearing pending) and *Anderson v. State,* ____S.W.2d____,

____ (Tex.C.App. No. 71,808, delivered September 11, 1996, slip op. at 15-17). We overrule appellant's fiftieth point of error.

Point of error fifty-one voices appellant's contention that the trial court's failure to define "continuing threat to society" violated his rights under the Eighth Amendment. We first note, as the State argues, that appellant has not preserved error because he never asked the trial court to define "continuing threat to society." *See* Tex.R.App.Proc. 52(a). Even if appellant had preserved his complaint for our review, his claim would fail, as this Court has repeatedly rejected this contention. *Garcia*, 887 S.W.2d at 859. Words which are not defined statutorily are to be given their usual meanings, and no specific instructions are necessary. *Id.* We overrule point of error fifty-one.

In points of error fifty-two and fifty-three, appellant asserts that the death penalty is cruel and unusual punishment under the Eighth and Fourteenth Amendments to the federal constitution, as well as under Article 1, Section 13 of the Texas Constitution. To support his federal constitutional claim, appellant "herein adopts the cogent arguments of Justice Harry Blackmun, which were recently made in his dissent from denial of certiorari in the Texas capital case of *Callins v Collins,* 114 S.Ct. 1127, 127 L.Ed.2d 534 (1994)." We addressed this point in *Lawton, supra,* and *McFarland, supra,* in which we referred those defendants to the Supreme Court's holdings in *Gregg v. Georgia,* 428 U.S. 153 (1976); *Jurek v. Texas,* 428 U.S. 262 (1976); and *Tuilaepa v. California,* ____U.S.____, 114 S.C.t 2630, 129 L.Ed.2d 750 (1994) and adopted those holdings as our own. We overrule appellant's fifty-second point of error.

Under appellant's state constitutional claim, appellant relies on the distinction between the United States Constitution, which proscribes "cruel *and* unusual" punishment, and the Texas Constitution, which proscribes "cruel *or* unusual punishment." The alleged noteworthiness of this distinction is not readily apparent. Moreover, appellant fails to explain how this difference creates a broader protection than the United States Constitution. Because appellant has not adequately briefed this point, we overrule point fifty-three. Tex.R.App.Proc. 74(f); *See Lawton, supra,* and *McFarland, supra.*

Finally, in points of error fifty-four and fifty-five, appellant alleges that given the differing capital sentencing schemes that Texas has had since 1989, the death penalty has been arbitrarily imposed in violation of the federal and state constitutions. Again, we addressed these identical arguments in *Lawton, supra,* and *McFarland, supra,* and refer appellant to our holdings and explanations in those cases. Because appellant raises no new arguments in support of these points of error, we overrule points fifty-four and fifty-five.

After having addressed and overruled all of appellant's points, we hereby affirm.

MEYERS, JUDGE

Delivered: December 18, 1996
En Banc
Do Not Publish

McCormick, P.J. and Clinton, J., concur in the result.
White, J., not participating.

BILLY FRANK VICKERS, Appellant

No. 71,801 v. - - - - Appeal from LAMAR County

THE STATE OF TEXAS

DISSENTING OPINION

I dissent to the majority's treatment of points six and eight, in which appellant claims violations of his right to due process under the Fourteenth Amendment of the United States Constitution in the trial court denying his requests to inform prospective jurors during voir dire and petit jurors via punishment jury charge instruction of the Texas law which made him ineligible for parole until serving 35 calendar years of incarceration if assessed a sentence of life for capital murder.

In light of *Simmons v. South Carolina*, ____U.S.____, 114 S.C.t 2187, 129 L.Ed.2d 133 (1994), due process may require, in the face of a proper request, that the jury be informed of the amount of time a defendant must serve before becoming eligible for parole when sentenced to lilfe for capital murder. In assessing future dangerousness and answering the statutory issue thereon, the actual duration of the defendant's prison sentence is unquestionably relevant. *Id.* For the reasons stated in my dissenting opinion in Rhoades v. State, ____S.W.2d____ (Tex.Cr.App. No. 71,595, delivered October 2, 1996) (Overstreet, J., dissenting), I continue to believe that it is proper for the sentencing jury in a death penalty case to be informed at punishment regarding parole and how much time a capital murder defendant will be required by law to serve on a life sentence before becoming even eligible

for parole. Jurors should be informed of this at some point, either during jury selection voir dire or in the punishment jury charge which explains the law, so that they can accurately determine whether a defendant is a future danger, i.e. whether there is a probability that he would commit criminal acts of violence that would constitute a continuing threat to society. I also note that pen packets indicate that appellant's date of birth was July 30, 1945; thus he was 47 years old on the date of the offense and would have been 82 years old before even becoming eligible for parole had he been assessed a life sentence. The jury should have been permitted to answer the future dangerousness issue with the knowledge that appellant would have been legally required to remain incarcerated to the age of 82 in determining whether there was a probability that he would commit criminal acts of violence that would constitute a continuing threat to society.

Because the majority continues to authorize and encourage the hiding of such critical information and keeping juries in the dark, I continue to respectfully dissent.

OVERSTREET, JUDGE

Delivered: December 18, 1996
En Banc
Do Not Publish

Supreme Court, U. S.
FILED
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(2)

No. 97-246

IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM, 1997

BILLY FRANK VICKERS,
Petitioner,

v.

THE STATE OF TEXAS,
Respondent.

On Petition for Writ of Certiorari
To the Texas Court of Criminal Appeals

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. **Whether Vickers' claim that the testimony of a co-defendant was improperly admitted as the fruit of Vickers' improperly obtained confession is procedurally barred, whether it is otherwise without merit because his confession was properly obtained, and whether the testimony of his co-defendant would have been obtained in any event.**

2. **Whether a bullet was properly seized from Vickers' body by medical personnel, and, even if its initial seizure was improper, whether its ultimate seizure was inevitable.**

3. **Whether Vickers' jury was misled regarding his parole eligibility on a life sentence.**

4. **Whether the special issue submitted to Texas juries in response to *Penry v. Lynaugh* violates *Furman v. Georgia.***

5. **Whether the definition of mitigating evidence given to the jury was unconstitutionally narrow.**

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No. 97-246

IN THE
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BILLY FRANK VICKERS,
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v.

THE STATE OF TEXAS,
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On Petition for Writ of Certiorari
To the Texas Court of Criminal Appeals

RESPONDENT'S BRIEF IN OPPOSITION

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES the State of Texas, Respondent[1] herein, by and through the Attorney General of Texas, and files this Brief in Opposition.

[1] The Petitioner will be referred to as "Vickers" and the Respondent as "the State." "Pet." refers to the Petition. "SR" refers to the transcription of the testimony at trial, by volume and page number. "Tr" refers to the documents filed in the state trial court.

OPINION BELOW

The unpublished opinion of the Texas Court of Criminal Appeals affirming Vickers' conviction and sentence of death is attached to Vickers' petition. *Vickers v. State*, No. 71,801 (Tex. Crim. App. 1996).

JURISDICTION

Vickers seeks to invoke the jurisdiction of this Court under the provisions of 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

Vickers bases his claim upon the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition Below

Vickers was indicted in cause number 14793 on August 18, 1993, in the 6th Judicial District Court of Lamar County, Texas, for the capital offense of murder while in the course of robbery. *See* TEX. PENAL CODE ANN. § 19.03(a)(2) (West 1996 Supp.). After a change of venue, Vickers was tried in the 199th District Court of Collin County, Texas, under cause number 199-80910-93. Vickers was tried before a jury upon his plea of not guilty and found guilty of the capital offense on October 8, 1993. On October 13, 1993, following a separate punishment hearing, the jury returned a verdict in which it affirmatively answered the first two special punishment issues and negatively answered the third special punishment issue submitted pursuant to article 37.071, §§ 2(b)(1), 2(b)(2), and 2(e) of the Texas Code of Criminal Procedure (West 1996 Supp.). In accordance with state law, the trial court

assessed Vickers' punishment at death.

Vickers appealed his conviction and sentence to the Court of Criminal Appeals of Texas, which affirmed his conviction and sentence on December 18, 1996. *Vickers v. State*, No. 71,801 (Tex. Crim. App. 1996). This Petition followed.

B. Statement of Facts

1. Guilt-Innocence Phase

The victim, Phillip Kinslow, ran the Arthur City Superette in Lamar County, cashing payroll checks as a part of his services. 22 SR 83. On the evening of March 12, 1993, the victim's wife was at home, expecting him to be coming home from the store with a large amount of money as usual, when she heard rapid gun fire and saw a pair of headlights at the front gate. 22 SR 84, 90-92. Her husband then drove up the driveway, and, as a consequence of gunshot wounds he had received, ran off the road and hit a tree. 22 SR 96. A money bag found in his truck contained $18,300.00, and his handgun contained six spent shells and had been recently fired. 22 SR 73-74, 105. The medical examiner determined that the victim had been shot once in the chest and twice in the right arm. 22 SR 128-29. One .22 caliber bullet was recovered from his body. 22 SR 135.

Approximately 22 hours after the shooting, the police received a report of a suspicious person with blood on his leg about two miles away from the scene of the murder. 22 SR 63, 71-72. Upon arrival, an officer found Vickers walking with the help of some tree branches, apparently shot three times in the leg. 22 SR 63, 71, 246. A bullet recovered by medical personnel from Vickers' knee was found to have been fired from the victim's gun. 23 SR 627. A footprint found near the scene of the crime was found to have been made by the same size, brand, and style of Reebok shoe that Vickers was wearing when he was found. 23 SR

679-80. A tracking dog brought to the scene tracked a scent through a wooded area, finding a toboggan hat in the process. 22 SR 166-68. This hat was found to contain hairs that were consistent with Vickers'. 25 SR 750. When officers discovered a place nearby where someone had bled and laid down some branches to make a bed, the dog tracked that new scent to a location just yards from where Vickers was found. 22 SR 171-173.

Vickers and his co-defendants, Tommy Perkins and Jason Martin, had been seen at the victim's store earlier on the day of the offense. 23 SR 322. The three co-defendants were also seen together at Vickers' house the evening of the offense. 23 SR 336.

Vickers' co-defendant, Jason Martin, testified pursuant to a plea bargain. He testified that Vickers had approached him requesting information about various businesses that could be robbed, including the victim's store. 23 SR 368-70. Martin went with Vickers to the victim's store on at least four occasions in preparation for the robbery. 23 SR 382, 390, 417, 431. They also went to the victim's home twice beforehand. 23 SR 396, 398, 402. The plan was for Martin to drive the getaway car and for Vickers and Perkins to rush the victim at the gate to his driveway, tie him up, take his money, and drive his truck to where Martin would be waiting. 23 SR 458. Before they left Vickers' house for the robbery, Martin observed Vickers with a .22 caliber pistol and Perkins with a .38 caliber pistol. 23 SR 424. Vickers' still had the pistol in the car on the way to the robbery, 23 SR 463, and a subsequent search of Vickers' home revealed .22 caliber ammunition. 22 SR 239. Martin did not witness the actual robbery and the co-defendant Perkins did not testify at Vickers' trial. However, both Martin and Perkins' girlfriend recounted Perkins' statements to them that Vickers had approached the victim and exchanged gunfire with him. 23 SR 482; 24 SR 707.

2. Punishment Phase

Aside from testimony of seven individuals regarding Vickers' bad reputation in the community, the State introduced evidence at the punishment phase that Vickers had previously been twice convicted of Burglary, twice of being a Felon in Possession of Burglary Tools, and also of Arson and Conspiracy to Commit Arson. State's Exhibits 50-57.

REASONS FOR DENYING THE WRIT

I.

The Question Presented for Review Is Unworthy of this Court's Attention.

Rule 10 of the Rules of the Supreme Court provides that review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only for compelling reasons. Vickers advances no compelling reason in this case, and none exists. Further, the issues in this case involve only the application of established constitutional principles to the facts. Thus, the Petition presents no important question of law to justify this Court's exercise of its *certiorari* jurisdiction.

II.

Vickers' claim that the testimony of a co-defendant was improperly admitted as the fruit of Vickers' improperly obtained confession is procedurally barred and is otherwise without merit because his confession was properly obtained and because the testimony of his co-defendant would have been obtained in any event.

Vickers first claims that the testimony of a co-defendant was improperly admitted because it was the fruit of custodial statements that Vickers gave after he was denied his requests for the appointment of counsel and misled as to the consequences of making a statement. This claim fails because it is procedurally barred, because Vickers' initiated all questioning, because his statements were voluntary, and because it was inevitable that the State would have obtained the testimony of Vickers' co-defendant.

A. Procedural Default

In claiming error in the Court of Criminal Appeals' failure to grant relief on this claim, Vickers fails to note that the Court of Criminal Appeals did not address this claim on the merits due to his failure to raise it timely at trial. Specifically, the court found that Vickers had only objected prior to trial to the admission of his own confession and did not challenge the admissibility of the co-defendant's statements until forty pages into that individual's testimony. Pet. App. A-38; 23 SR 405.

The Court "will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment" because it "in fact lack[s] jurisdiction to review such independently supported judgments on

direct appeal: since the state-law determination is sufficient to sustain the decree, any opinion of this Court on the federal question would be purely advisory." *Lambrix v. Singletary*, 117 S.Ct. 1517, 1522 (1997) (*citing Coleman v. Thompson*, 501 U.S. 722, 729 (1991)); *Sochor v. Florida*, 504 U.S. 527, 533 (1992); *Michigan v. Long*, 463 U.S. 1032, 1042 (1983); *Engle v. Isaac*, 456 U.S. 107, 129 (1982).

Vickers has not alleged that the procedural bar applied by the Court of Criminal Appeals was not independent or adequate, nor has he alleged any other ground for avoiding the application of the bar.[2] Because Vickers has made no argument as to why this

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[2] In the context of habeas corpus proceedings, the Court has held that the failure to preserve error in state court may be excused if a petitioner satisfies the "cause and prejudice" standard or if his claim comes within the "fundamental miscarriage of justice" exception. To establish cause, a habeas petitioner must ordinarily identify circumstances external to the defense that prevented properly asserting a claim in state court. *McCleskey v. Zant*, 499 U.S. 467, 497 (1991), *citing Murray v. Carrier*, 477 U.S. 478, 492 (1986). Ineffective assistance of counsel cannot constitute cause unless deficiencies or omissions in counsel's performance both resulted in the default and constitute constitutionally ineffective assistance at trial or on direct appeal. *Coleman v. Thompson*, 501 U.S. at 752. The requisite showing of prejudice is significantly greater than that required to establish plain error. "The habeas petitioner must show 'not merely that the errors at . . . trial created a possibility of prejudice, but that they worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions.'" *Murray v. Carrier* , 477 U.S. 478, 493, *citing United States v. Frady*, 456 U.S., 152, 170 (1982). A petitioner comes within the fundamental miscarriage of justice exception to the "cause and prejudice" requirement (1) if, as a consequence of the identified constitutional error in the guilt-innocence phase and in light of new evidence, "it is more likely than not that no reasonable juror would have convicted him," *Schlup v. Delo*, 513 U.S. 298, 329 (1995), or (2) if he establishes "by clear and convincing evidence that, but for

Court should abrogate one of its most fundamental principles of review, certiorari review is unwarranted.

Even if the bar were not to apply, however, Vickers' claims would still be without merit. The record demonstrates that Vickers' rights to counsel were observed, that he was not deceived regarding the charges against him, and that all evidence admitted at trial was obtained independently of Vickers' confession.

B. Sixth Amendment Claim

It is undisputed that the Sixth Amendment precludes the interrogation of a suspect after he has invoked his right to counsel. *Michigan v. Jackson*, 475 U.S. 625 (1986). However, where a defendant initiates communication with authorities, the right to counsel is not violated. In *Edwards v. Arizona*, 451 U.S. 477, 484-85 (1980), the Court held in the context of a Fifth Amendment claim that "an accused . . . , having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further

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the constitutional error at his sentencing hearing, no reasonable juror would have found him eligible for the death penalty" under state law. *Sawyer v. Whitley*, 505 U.S. 333, 350 (1992).

The Director notes that the Court has not previously applied these exceptions to cases on direct appeal. However, even if applicable, the only possible cause that Vickers could allege would be the ineffective assistance of counsel. Of course, Vickers did not allege such a claim in the court below and thus cannot urge it in order to overcome the procedural bar here. *See Murray v. Carrier*, 477 U.S. 478, 489 (1986) (noting that "a claim of ineffective assistance [must] be presented to the state courts as an independent claim before it may be used to establish cause for a procedural default").

communication, exchanges, or conversations with the police." Similarly, the Court held under the Fifth Amendment in *Oregon v. Bradshaw*, 462 U.S. 1039, 1043 (1983), that the defendant's comment, "[w]ell, what is going to happen to me now" opened the door to further questioning by authorities even though he had previously requested counsel.

Though *Edwards* and *Bradshaw* were decided on Fifth Amendment grounds, the Court has specifically noted that much of the reasoning of *Edwards* applies in the Sixth Amendment context. *Michigan v. Jackson*, 475 U.S. at 635. The Court has also several times implicitly adopted the *Edwards* exception for defendant initiated conversations. In *Jackson*, for example, the Court's holding that "[j]ust as written waivers are insufficient to justify police-initiated interrogations after the request for counsel in a Fifth Amendment analysis, so too they are insufficient to justify police-initiated interrogations after the request for counsel in a Sixth Amendment analysis" reflects the adoption of the *Edwards* exception for cases of defendant initiated conversations. *Id.* at 635-1410-11. When the Court restated the holding of *Jackson* in *Michigan v. Harvey*, 494 U.S. 344, 345 (1990), it again limited its statement of the prophylactic rule to "police-initiated conversation." The Court then specifically rejected the "contention that a defendant cannot execute a valid waiver of the right to counsel without first speaking to an attorney" because such a "view would render the prophylactic rule adopted *Jackson* wholly unnecessary, because even waivers given during defendant-initiated conversations would be per se involuntary or otherwise invalid, unless counsel were first notified." *Id.* at 353. Similarly, in *Patterson v. Illinois*, 487 U.S. 285, 291 (1988), the Court summarized the rule under *Jackson* as including the exception for defendant initiated conversations: "[h]ad petitioner indicated he wanted the assistance of counsel, the authorities' interview with him would have stopped, and further questioning would have been forbidden (unless petitioner called for such a meeting)." It is thus clear that a defendant may waive his Sixth Amendment right to

counsel by initiating conversation with officials, just as in the Fifth Amendment context.

Finally, though the Court has not explicitly so held, it is reasonable to assume that, as in the Fifth Amendment context discussed below, evidence that is obtained independently of a Sixth Amendment violation is admissible. As discussed above, the analysis given to Fifth and Sixth Amendment issues is not significantly different in this area. Reference to the Sixth Amendment case of *Michigan v. Harvey*, discussed above is also worthwhile in this regard. Notably, when the Court set out the general rule that "after a defendant requests assistance of counsel, any waiver of Sixth Amendment rights given in a discussion initiated by police is presumed invalid," it also incorporated the Fifth Amendment general rule that "evidence obtained *pursuant to* such a waiver is inadmissible in the prosecution's case in chief." (emphasis added). *Harvey*, 494 U.S. at 349.

The record reflects that, after he was taken to the hospital for gunshot wounds, Vickers was arraigned on the charge of murder and commented that "I guess now I need to see my lawyer" or "talk to my lawyer." 4 SR 12. No questioning of Vickers was conducted at that time. Vickers specifically requested counsel during his transport between the hospital and jail on March 17, 1993. 4 SR 32, 36. Again, law enforcement officers made no attempt to question him after he made this request. 4 SR 33. However, once at the jail, Vickers initiated contact with authorities by requesting to talk to a Texas Ranger and another investigator. 5 SR 273-74. After he learned that they were both out of town, he requested to talk to another officer on March 18, 1993. 5 SR 274-76. During that conversation, Vickers indicated that he wished to be informed of ballistics test results when they came in. 4 SR 60. When he was later informed that the results implicated him, he gave a written statement on March 26, 1993. 4 SR 61-62.

The officer also testified that, before Vickers implicated his co-defendants, the authorities had already obtained statements from witnesses identifying the co-defendants as being with Vickers and had even taken a statement from Vicker's co-defendant, Perkins, implicating Vickers as the shooter. 5 SR 239-42.

Vickers' statement was not introduced against him at trial. He challenges only the admission of his co-defendant's testimony as a fruit of his confession.

Vickers first states that he invoked his right to counsel at his arraignment. Pet. at 4. However, the state trial court specifically found that Vickers' first comment in his hospital room, where he was arraigned, that "now all I need to do is see my lawyer" was not a request that counsel be appointed. 5 Tr 435. The issue is irrelevant, however, because no questioning of Vickers was conducted at that time. The court found that Vickers actually did request counsel during his transport between the hospital and jail, but it also found that law enforcement officers made no attempt to question him after this request. 5 Tr 435-36. On the other hand, the trial court found that it was Vickers who initiated contact with authorities on March 18, 1993, by requesting to talk to officials. 5 Tr 436-38. Again, contrary to Vickers' assertion that he did not request to speak with officers, Pet at 3, the trial court found that Vickers requested to be informed of ballistics test results and that he initiated contact with authorities after being advised that the results had come in. 5 Tr 440-42.

Because Vickers clearly did initiate the questioning which led to his statement, no Sixth Amendment violation has been shown. Therefore, any statement by Vickers' co-defendant cannot be the product of improper questioning of Vickers'.

Finally, even if Vickers has demonstrated a Sixth Amendment violation, the testimony of his co-defendant was properly admitted as it would have been obtained inevitably. As noted above, at the time that Vickers gave his statement, officials already had located witnesses placing the co-defendant's with Vickers on the day of the murder, and had already obtained a statement from one of the co-defendants (who did not testified at trial) setting out the facts of the offense. Thus, Vickers' argument that his confession "led to the discovery" of the co-defendant who testified at trial is incorrect. Because the testimony of the co-defendant would have been obtained regardless of Vickers' statement, the Sixth Amendment does not mandate its suppression. Accordingly, this claim does not merit this Court's certiorari jurisdiction.

C. Fifth Amendment Claim

Vickers also claims that the interrogating officer misled him into confessing by not telling him that he could receive the death penalty and by giving an incorrect estimate of the sentence Vickers would receive.

The Court has held that the voluntariness of a confession must be judged in light of the totality of the circumstances to determine whether it was the "product of a free and deliberate choice" and whether it was made with a "full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." *Moran v. Burbine*, 475 U.S. 412, 421 (1986). *See also*, *Frazier v. Cupp*, 394 U.S. 731, 739 (1969) (holding that "[t]he fact that the police misrepresented the statements that [a codefendant] had made is, while relevant, insufficient in our view to make this otherwise voluntary confession inadmissible").

Here, Vickers was not misled into giving his confession, but made it with full awareness of the consequences of what he

was doing. Vickers' assertion that he was not informed of the possibility of capital murder charges is contradicted by the record. During his March 26, 1993, interview with Vickers' the investigating officer specifically compared Vickers' situation to an earlier capital murder case that Vickers had been involved in. *See* State's Exhibit 4 (Suppression Hearing) at 47, 54. He also pointed out that Vickers' co-defendants would probably implicate Vickers if given the chance because "[w]hen they're looking at capital murder charges, getting the death penalty or life in prison without parole or whatever, yea, I think they're gonna sing." *Id.* Though Vickers wanted to make a deal for a non-aggravated sentence, the officer told him that he could not make any deals, and the trial court found that Vickers knew that the officer could not make any deals. 4 SR 67; 5 SR 168. The officer also related a message from the district attorney that there would be no deals and that Vickers would be prosecuted "balls to the wall," with the prosecution "going for the max." 4 SR 72; 5 SR 443-45. It was only after Vickers was told that no deals would be made that he advised the officer that he still wanted to make his statement. 4 SR 76. At an unknown point in the questioning, the officer also told Vickers that he might be looking at between 30 years and a life sentence. 5 SR 214, 247-48.

Based on the interrogating officer's testimony at the suppression hearing, Vickers asserts that the officer did not tell him that he was looking at a possible death sentence because it would have had a "chilling effect" on the interview. The officer did not state this, however, but merely agreed with defense counsel during the hearing that mention of the death penalty can have a chilling effect on an interview. 5 SR 176. As noted above, during his questioning of Vickers, the officer specifically compared Vickers' situation to an earlier capital murder case that Vickers had been involved in and pointed out that Vickers' co-defendants would probably implicate Vickers if given the chance because they would be facing capital murder charges on the case. Although Vickers wanted to make a deal for a non-aggravated sentence, the

officer told him that he could not make any deals, and the trial court found that Vickers knew that the officer could not make any deals. 5 Tr 444. The trial court concluded that Vickers was aware of the possibility that this was a capital murder case. 5 Tr 445.

At an unknown point in the questioning, the officer did tell Vickers that he might be looking at between 30 years and a life sentence. However, as the trial court found, this reference did not reflect that any promises of leniency or deals had been made to the defendant, and Vickers did not believe that there had been. 5 Tr 449-50.

Presumably, the officer's statement of the possible time Vickers was facing was also based upon the idea that Vickers was telling him the truth about the extent of his involvement in the crime. However, review of Vickers' statement reveals that he denied being the actual shooter, contrary to the evidence admitted at trial. *See* State's Exhibit 10 (Suppression Hearing) at 10. Additionally, as the trial court also found, the officer specifically told Vickers that there were no deals for his cooperation, yet Vickers still signed his written statement two hours later. 5 Tr 450. As the court concluded, "[n]o law enforcement officer or other person acquired any statement from the defendant by means of trickery." 5 Tr 453.

Given the above record, it is clear that Vickers' confession was voluntary. It is simply irrelevant to the voluntariness of the confession that the officer gave him an erroneous estimate of the time he was facing, when that estimate was based upon erroneous information provided by Vickers. Further, the officer's statement that the co-defendant would be facing capital murder charges obviously would have made Vickers aware that he would also be facing such charges if he was the triggerman. Finally, it is notable that the officer did state that Vickers could be facing a life sentence and that the State did subsequently make a plea bargain offer to Vickers for a life sentence on the capital murder charges.

3 SR 8. Thus, the officer was correct in this respect. For these reasons, Vickers was not misled into giving his confession, and any testimony given by his co-defendants also cannot be the product of any improper questioning.

Finally, even if Vickers has demonstrated a Fifth Amendment violation, the testimony of his co-defendant was properly admitted. As noted above, at the time that Vickers gave his statement, officials already had located witnesses placing the co-defendant's with Vickers on the day of the murder, and had already obtained a statement from one of the co-defendants setting out the facts of the offense. Thus, the testimony of his co-defendant would have been obtained independently, regardless of Vickers' statement.

For all these reasons, this claim does not merit this Court's certiorari review.

III.

A bullet was properly seized from Vickers' body by medical personnel, and, even if its initial seizure was improper, its ultimate seizure was inevitable.

Vickers next claims that officers improperly seized a bullet that was removed from his leg after he was taken to a hospital. He asserts that the bullet could not be taken from him without a warrant. This argument fails because the bullet was seized by private citizens and was not seized by law enforcement personnel until a warrant had been obtained. It also fails because it was inevitable that the bullet would have been seized pursuant to a warrant.

The Court has held that "'seizure' of property occurs when there is some meaningful interference with an individual's

possessory interests in that property." *United States v. Jacobsen*, 466 U.S. 109, 113 (1984). Where a private citizen make a seizure, the test for suppression is "whether an individual, 'in light of all the circumstances of the case, must be regarded as having acted as an 'instrument' or agent of the state' in conducting a search or seizure." *Coolidge v. New Hampshire*, 403 U.S. 443, 487 (1971). As the Court noted in *Coolidge*, "it is not part of the policy underlying the Fourth and Fourteenth Amendments to discourage citizens from aiding to the utmost of their ability in the apprehension of criminals." *Id.* at 488. *See also State v. Perea*, 626 P.2d 851 (N.M. App.) (finding no improper seizure where a nurse seized the defendant's shirt and handed it over to the police because she believed a crime may have been committed), *cert. denied*, 627 P.2d 412 (N.M. 1981); *Commonwealth v. Storella*, 375 N.E.2d 348 (Mass. 1978) (finding no improper seizure where a surgeon removed a bullet because it was necessitated by "good medical practice" and did not act as a result of police pressure).

In this case, Vickers has failed to demonstrate that medical personnel who seized the bullet from his leg were acting as agents for the State. They did not remove the bullet from him at the State's instigation or in order to assist the State's investigation. Further, he has not demonstrated that the State actually took possession of the bullet prior to a warrant being issued, as the officer guarding Vickers simply had the medical personnel lock the bullet up in their own facilities.

Vickers' hospital records reflect that "[h]e came in mainly for increasing pain." Defense Exhibit 3 (Suppression Hearing) at 3. Vickers was taken to the hospital by law enforcement officers, but the officer guarding Vickers at the hospital did not request that he be operated on, nor did he request that medical personnel give him any foreign objects removed from Vickers. 24 SR 605-20. Instead, Vickers signed a consent form to the "surgical removal of bullet from left knee." Defense Exhibit 3 (Suppression Hearing) at 47. The doctor testified that the normal course of treatment for

injuries such as Vickers' is to remove the damaged tissue and debridement, apply antibiotics, and allow it to heal. 5 SR 302. That normal course of treatment was followed here.

An officer was in one of the hospital patient rooms waiting for Vickers when a nurse advised him that the doctor wanted the officer to go to surgery to get the bullet. 24 SR 615. The officer would not have gone to the emergency room but for that request, and, when he did go, he was handed the bullet without making a request for it. 24 SR 605, 610. Rather than keep the bullet without a warrant, the officer had hospital personnel lock the bullet in a room under the sole control of the hospital until a search warrant, which he had been advised was being prepared, arrived. 23 SR 562; 24 SR 605, 611.

Because the bullet was not seized by agents of the State, Vickers has failed to demonstrate a Fourth Amendment violation.

Additionally, Vickers has presented a classic claim of inevitable discovery in the Fourth Amendment context. As the Court affirmed in *Murray v. United States*, 487 U.S. 533, 542 (1988), where police have improperly seized evidence, it may be properly seized pursuant to a search warrant so long as the warrant is based upon independent information. Here, there is no possible argument that the search warrant was based upon the allegedly improper seizure of the bullet. Instead, as the officer testified, the warrant was already being prepared before he received the bullet. Accordingly, the ultimate seizure of the bullet by search warrant was proper.

For these reasons, this claim does not merit this Court's certiorari jurisdiction.

IV.

Vickers' *Simmons v. North Carolina* claim is without merit in light of the record.

Vickers next claims that the trial court erred in refusing to instruct the jury that he would serve at least 35 years in prison if given a life sentence. This claim is utterly without merit in light of the instructions and argument given to the jury that Vickers would *never* be released on parole if given a life sentence.

In *Simmons v. North Carolina*, the Court reaffirmed the principle that the states are generally free to decide whether a capital sentencing jury should be informed of the possibility of the defendant's early release if sentenced to life imprisonment. *Simmons*, 114 S. Ct. 2187, 2196 (1994) (plurality opinion); *id.* at 2200 (O'Connor and Kennedy, JJ., concurring in judgment). As an exception to this general rule, however, the Court held that a capital defendant has a due process right to inform the jury of his ineligibility for parole where (1) life without the possibility of parole is the alternative to a death sentence, and (2) future dangerousness is a sentencing inquiry. *Id.* at 2190 (plurality opinion); *id.* at 2201 (O'Connor and Kennedy, JJ., concurring). The concern underlying this exception is that jurors reasonably could be expected to believe that a defendant sentenced to life in prison would be eligible for parole at *some* point, and the absence of an instruction or other information about parole ineligibility was thus misleading where there was no such possibility. *Id.* at 2194-95; *id.* at 2191 (plurality opinion). Consistent with this rationale, *Simmons* specifically excepted from its holding those states, such as Texas, in which life without parole is not a sentencing option. *Id.* at 2195-96 nn.7-8.

In contrast with many capital cases in Texas, however, here the jury was given the exact instruction that was not given in *Simmons*. It was instructed,

> in answering the Special Issues given in this charge and in determining punishment in this case, that you must not discuss among yourselves, speculate or consider how long the defendant will be required to serve any sentence of confinement or to speculate upon or consider any possible actions of the Parole Division of the Texas Department of Criminal Justice. *You are instructed that a Life Sentence in a Capital Murder case means life.*

5 Tr 408-09 (emphasis added). Thus, the jury could not have believed that Vickers would be eligible for parole in some short time period because it was actually erroneously instructed to Vickers' benefit that he would never be eligible for parole if given a life sentence. Further, defense counsel's argument at punishment repeatedly reinforced this instruction:

> I don't think you'd be giving him anything by making him spend *the rest of his life* in the penitentiary. That's not letting somebody go. That's not letting them get away without paying for their crimes. *A life sentence is a life sentence in a capital case.* This man would have to spend *the rest of his life* in the penitentiary. [27 SR 1105-06]
>
> He's going to at the very least spend every waking day in a penitentiary *until he dies*. [27 SR 1109]
>
> He's going to get a life sentence at the very least. *Life means life*. [27 SR 1112]
>
> He's going to be there for *the rest of his life*. [27 SR 1113]

> Mr. Vickers will be spending *the rest of his life* in the penitentiary if you give him a life sentence. [27 SR 1117]
>
> He will never have a free day for *the rest of his life*. [27 SR 1117]
>
> I don't see how society will be harmed at all by Mr. Vickers serving *the rest of his life* in the penitentiary as opposed to the state one day executing that man. [27 SR 1118]
>
> The punishment will be severe. *He will die in the penitentiary*. [27 SR 1120]
>
> [A]re we better off executing this man or as a society will the ends of justice be served if you know that he's going to spend *the rest of his life* in the penitentiary. [27 SR 1121]
>
> I think justice will be served if Mr. Vickers spends *the rest of his life* in the penitentiary . . . . [27 SR 1122]

The prosecution made no attempt to dispute these statements. Instead, it argued that "society can include the penitentiary" and that the future dangerousness issue would be meaningless if the defendant could just say, "he's going to be in there for life and he's not a threat to society then." 27 SR 1137.

Based upon the above record, it is clear that Vickers' argument that the jury was somehow misled into believing that he would be eligible for parole in a short time is utterly without merit.

Additionally, the State notes that, pursuant to Vickers' request, one of his co-defendants was allowed to testify during the guilt-innocence portion of trial that he had been charged with capital murder on the instant case and that it was his understanding that he "would have to spend 35 actual calendar years of your life [sentence] before being eligible for parole." 25 SR 807. During guilt-innocence arguments defense counsel noted this testimony that the co-defendant "was going to have to spend 35 actual calendar years in the penitentiary before even being eligible for parole." 25 SR 884. Given this testimony and argument, even if it could be assumed that the jury disregarded its instructions that "life meant life"in Texas, it would be unreasonable to believe that the jury would have thought that Vickers' would have been eligible for parole at some point earlier than 35 years.

Because the jury was not misled to Vickers' detriment, this claim does not merit this Court's certiorari review.

V.

The special issue submitted to Texas juries in response to *Penry v. Lynaugh* does not violate *Furman v. Georgia.*

Next, Vickers argues that the second special issue submitted during the punishment phase of trial, the so-called "*Penry*" special issue,[3] renders the Texas death penalty scheme

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[3] The new special issue asked the jury,

> [w]hether, taking into consideration all of the evidence including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than death

unconstitutional "by permitting open-ended discretion as condemned by *Furman v. Georgia*," 408 U.S. 238 (1972). Pet. at 9. Contrary to this assertion, the addition of a new instruction in response to this Court's decision in *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989), does not result in a capital sentencing scheme that violates the principles of *Furman*.

Vickers' argument fails because it is based on a fundamental misunderstanding of this Court's holding in *Furman*. It is now well settled that a capital sentencing scheme must meet two goals in order to comply with the dictates of *Furman*: (1) it must narrow the category of persons convicted of murder who are eligible for the death penalty and (2) provide an individualized determination of the propriety of the death penalty in a particular case on the basis of the character of the individual and the circumstances of the offense. *Tuilaepa v. California*, 512 U.S. 967, 971-72 (1994). Thus, the "untrammeled discretion" with which *Furman* dealt was the unrestricted discretion to find a defendant "eligible" for the death penalty, not the discretion given to juries to consider any and all relevant mitigating evidence that a defendant proffers as a basis for a sentence less than death. *Furman*, 408 U.S. at 248 (Douglas, J., concurring). On the contrary, the Constitution demands that juries be given broad discretion to consider such mitigating evidence:

> 'Once the jury finds that the defendant falls within the legislatively defined category of persons eligible for the death penalty, . . . the jury then is free to consider a myriad of facts to determine whether death is the appropriate punishment.' *Ramos, supra*, at 1008. Indeed, the sentencer may

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sentence be imposed.

Tr. 406-407.

> be given 'unbridled discretion in determining whether the death penalty should be imposed after it has found that the defendant is a member of the class made eligible for that penalty.' *Zant, supra,* at 875; *see also Barclay v. Florida*, 463 U.S. 939, 948-51 (1983) (plurality opinion).

Tuilaepa, 512 U.S. at 979-80.

Accordingly, the addition of the "*Penry*" special issue did not render the Texas death penalty scheme subject to the arbitrariness condemned in *Furman*. If anything, the new instruction only serves to bring the Texas scheme into further compliance with Eighth Amendment concerns.

VI.

The definition of mitigating evidence given to the jury was not unconstitutionally narrow.

Vickers next argues that the definition of mitigating evidence given the jury was unconstitutionally narrow. However, Vickers' claim fails in light of the other instructions given to the jury.

As the Court has held,

> [T]he Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.

Lockett v. Ohio, 438 U.S. 586, 604 (1978).

The jury was given the following instructions:

> You shall consider all evidence submitted to you during the whole trial as to the defendant's background or character or the circumstances of the offense that militates for or mitigates against the imposition of the death penalty.
>
> . . .
>
> you shall consider mitigating evidence or mitigating circumstance or circumstances to be evidence, circumstance, or circumstances that a juror might regard as reducing the defendant's moral blameworthiness.
>
> . . .
>
> you are to consider all relevant mitigating circumstances, if any, supported by the evidence presented in both phases of the trial, whether presented by the State or the defendant. A mitigating circumstance may include but is not limited to, any aspect of a defendant's character, background, record, emotional instability, intelligence, family situation or circumstances of the crime which you believe would make a death sentence inappropriate in this case.

5 Tr 406-07.

Finally, the charge instructed the jury to decide,

> [w]hether, taking into consideration all of the evidence including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than death

sentence be imposed.

Tr. 406-07.

Vickers has not demonstrated that the above instructions precluded the sentencer from considering any mitigating evidence. Accordingly, this claim does not merit this Court's certiorari review.

CONCLUSION

For the foregoing reasons, the state respectfully requests that the petition for writ of certiorari be denied.

Respectfully submitted,

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